

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

OFFICE COPY

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1920.

No. 3425 **674**

**J. E. TAYLOR & COMPANY, A CORPORATION, AND GEORGE
W. KERNODLE, APPELLANTS,**

vs.

EMPIRE LIGHTING FIXTURE CO., INC., A CORPORATION.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JULY 15, 1920.

PRINTED SEPTEMBER 1, 1920.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1920.

No. 3425.

J. E. TAYLOR & COMPANY, A CORPORATION, AND GEORGE
W. KERNODLE, APPELLANTS,

vs.

EMPIRE LIGHTING FIXTURE CO., INC., A CORPORATION,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Declaration	1	1
Affidavit of merit.....	4	3
Plaintiff's Exhibit "A".....	7	5
"B".....	8	7
"C".....	9	8
Plea of George W. Kernodle.....	11	9
Affidavit of defense.....	11	9
Pleas of J. E. Taylor and Company.....	14	11
Affidavit of defense for defendant J. E. Taylor & Co.....	14	11
Joinder in issue.....	19	14
Memorandum: Verdict for plaintiff for \$3,214.25, with interest from February 1, 1917.....	20	14
Motions for new trial argued and submitted; motions severally overruled and judgment on verdict ordered; judgment; ap- peal noted.....	20	14

Memoranda : Supersedeas bonds approved and filed ; time to submit bill of exceptions extended ; bill of exceptions submitted	21	15
Order making bill of exceptions part of record.....	21	15
Assignments of error.....	22	15
Designation of record.....	22	16
Clerk's certificate.....	23	16
Bill of exceptions.....	25	17
Testimony of Percy I. Ansorge.....	25	17
G. W. Kernodle.....	34	25
Norman I. Taylor.....	35	25
William L. Browning.....	36	26
Further testimony of Norman I. Taylor.....	39	27
Defendants' prayers.....	44	32
Instructions to jury.....	46	35

Court of Appeals of the District of Columbia.

No. 3425.

J. E. TAYLOR & COMPANY, a Corp., et al., Appellants,

vs.

EMPIRE LIGHTING FIXTURE Co., INC., a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 60437.

EMPIRE LIGHTING FIXTURE Co., INC., a Corporation, Plaintiff,

vs.

J. E. TAYLOR & COMPANY, a Corporation, and GEORGE W. KERNODLE,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the aboye-entitled cause, to wit:

1 Declaration.

Filed July 12, 1917.

In the Supreme Court of the District of Columbia.

At Law. No. 60437.

EMPIRE LIGHTING FIXTURE Co., INC., a Corporation, Plaintiff,

vs.

J. E. TAYLOR & COMPANY, a Corporation, and GEORGE W. KERNODLE,
Defendants.

The plaintiff, Empire Lighting Fixture Co., a corporation organized and existing under the laws of the state of New York, sues the defendants J. E. Taylor & Company, a corporation organized and

existing under the laws of the state of New Jersey, and George W. Kernodle, for that heretofore, to wit, on the 17th day of July, 1916, the plaintiff and the defendant J. E. Taylor & Company entered into a contract in writing, consisting of a proposal dated July 14, 1916, addressed by the plaintiff to the defendant J. E. Taylor & Company, and accepted at the bottom thereof in writing by the said defendant J. E. Taylor & Company, and delivered to the plaintiff on to wit the 17th day of July, 1916, which said proposal and acceptance, constituting said contract, is attached hereto and marked plaintiff's exhibit A, by the terms whereof it was agreed that the plaintiff would furnish to said defendant J. E. Taylor & Co., f. o. b. New York, the lighting fixtures enumerated in said contract, and that the said defendant

2 would pay therefor the net sum of Forty-Seven Hundred and Fifty-Six Dollars (\$4,756), on the terms that the fixtures should be paid for thirty days from date of shipment, or in cash in advance of shipment if the account should run beyond Fifteen Hundred Dollars (\$1,500). Simultaneously with the delivery to the plaintiff of said accepted proposal the said defendant George W. Kernodle delivered to the plaintiffs an instrument in writing, signed by him as G. W. Kernodle, which said written instrument is attached hereto and marked plaintiff's exhibit B, by the terms whereof the said defendant, for good and valuable consideration, agreed to and with the plaintiff that should said defendant J. E. Taylor & Company fail to pay for the lighting fixtures furnished by the plaintiff to the said De Luxe Apartment House, according to the terms of the aforesaid contract between the plaintiff and the said J. E. Taylor & Company, that the said defendant Kernodle would make such payments, for the account of the said defendant J. E. Taylor & Company, to the plaintiff, the Empire Lighting Fixture Co., the same as if he had purchased the merchandise for his own account; and the plaintiff thereupon, relying upon the said promises and undertakings of the said defendants, proceeded with the performance of its part of said contract, as changed in a few minor particulars from time to time by the parties thereto, and manufactured all of the fixtures enumerated in its said contract with J. E. Taylor & Company, as so changed, in accordance with plans and specifications furnished to it by the said defendant J. E. Taylor & Company and delivered to the said defendant J. E. Taylor & Company such fixtures until the account for the same exceeded the sum of Fifteen Hundred Dollars (\$1,500),

3 as is more particularly shown by particulars of demand attached hereto, marked plaintiff's exhibit C, and asked to be taken and read as a part hereof, and tendered the remainder of said fixtures in accordance with the terms of said contract; and although the plaintiff has performed all conditions precedent on its part, and all things have happened and occurred, and all periods of time have elapsed to entitle the plaintiff to a performance of the said contract by the said defendants J. E. Taylor & Company and said George W. Kernodle, yet the said defendants, nor either of them, have paid to the plaintiffs the said Forty-Seven Hundred and Fifty-Six Dollars (\$4,756), due and owing for said fixtures, or any part thereof, although the same has been often demanded of said defend-

ants and each of them; and by reason thereof, the plaintiff has been damaged, and has lost, the sum of Four Thousand Seven Hundred and Fifty-Six Dollars (\$4,756), with interest thereon from the first day of January, 1917.

Wherefore, the plaintiff brings this suit and claims of the defendants the sum of Four Thousand Seven Hundred and Fifty-Six Dollars (\$4,756) with interest as aforesaid, together with costs.

BYNUM E. HINTON,
Attorney for Plaintiff.

4

Affidavit of Merit.

STATE OF NEW YORK,
County of New York, ss:

Percy I. Ansorge, being duly sworn deposes and says that he is the president of the Empire Lighting Fixture Co., Inc., a corporation organized and existing under the laws of the State of New York, which corporation is the plaintiff named in the foregoing declaration, entitled "Empire Lighting Fixture Co., Inc., vs. J. E. Taylor & Company, a corporation, and George W. Kernodle", in the Supreme Court of the District of Columbia, and says that the plaintiff has a good cause of action against the said defendants, which cause of action is as stated in said declaration; that is to say, that heretofore to wit on or about the 14th day of July, 1916, the plaintiff was requested by the agents of the defendant J. E. Taylor & Company to enter into a contract with the said J. E. Taylor & Company to furnish certain lighting fixtures for the apartment known as the De Luxe Apartment House, to be constructed by one Bates Warren in the District of Columbia, and accompanied by a guarantee as follows:

"Empire Lighting Fixture Co.,
224 Centre St.,
New York City, N. Y.

GENTLEMEN:

I hereby guarantee the payment of all bills for goods sold to J. E. Taylor & Co. relative to the De Luxe Apartment House contract, for fixtures delivered and approved, according to the terms agreed upon.
Respectfully yours,

G. W. KERNODLE,
1409 Kennedy St.,
Washington, D. C.";

5 that this form of guarantee was not satisfactory to the plaintiff, and the plaintiff thereupon prepared the form of guarantee attached to the foregoing declaration and marked plaintiff's exhibit B, and also wrote out the form of proposal or agreement marked plaintiff's exhibit A, and attached to the foregoing declaration, both of which papers were forwarded to the defendant J. E. Taylor & Company, to have the agreement or proposal accepted by

J. E. Taylor & Company, and the form of guarantee signed by the defendant G. W. Kernodle, which was accordingly done, and both of which papers were returned and together delivered to the plaintiff in New York, concluding the contract between the parties, as alleged in said declaration.

Thereafter the plaintiff proceeded with the manufacture of said lighting fixtures in accordance with the terms and requirements of its said contract, and in due course delivered to the said De Luxe Apartment, under said contract, fixtures until the account therefor was considerably beyond the amount of \$1,500.00, as shown in the particulars of demand attached to the foregoing declaration, and made a part hereof as if herein fully set forth, and as said defendants failed to reduce said account by making payments on account thereof, and also failed to pay in advance of shipment for the balance of said fixtures, the same have never been shipped, but have been manufactured and made ready for shipment, and repeatedly tendered to the said defendants, and are now held ready for shipment as soon as the defendant J. E. Taylor & Co. has complied with the terms of their agreement as to payments.

6 Although the plaintiff has performed all conditions precedent on its part, and all things have happened and occurred, and all periods of time have elapsed to entitle the plaintiff to a performance of the said contract by the said defendants J. E. Taylor & Company and said George W. Kernodle, yet the said defendants, nor either of them, have paid to the plaintiff the said \$4,756.00, due and owing for said fixtures, nor any part thereof, although the same has been often demanded of said defendants and each of them, and by reason thereof there is now due and owing from the said defendants to the plaintiff the full sum of \$4,756.00, with interest thereon from the 1st day of January, 1917, exclusive of all set-offs and just grounds of defense.

PERCY I. ANSORGE.

Subscribed and sworn to before me this 15th day of June, 1917.

[SEAL.]

SAMUEL KAPLAN,

Notary Public, New York County No. 17,

Register's Office No. 9011.

Commission Expires March 30-1919.

New York, July 14, 1916.

J. E. Taylor & Co.,
1324 Eye St., N. W.,
Washington, D. C.

GENTLEMEN:

We hereby agree to furnish, f. o. b. New York, the following fixtures, not wired, without sockets & joints, for the net agreed sum of Forty-seven Hundred and Fifty-six Dollars, (\$4,756.00), terms: 30 days from date of shipment, payment to be anticipated if account runs beyond Fifteen Hundred Dollars, (\$1,500.00).

Porticos	2	#W 190	4 lt. el.	Lantern, Gold & Black finish.
Pub. Cor.	2	W 191	6 lt. el.	Semi-indirect fixture, Gold & black finish.
Small Cor.	9	W 192	3 lt. el.	" " " " " "
Ret. Rm.-men	1		4 lt. el.	16" Marbolite dish, Bronze Gold finish.
" "	4		1 lt. el.	Cast metal brackets, " " " "
L. Ret. Rm.	1	W 193	4 lt. el.	Semi-indirect fixture, Bronze Gold " "
" " W.	4	5245	2 lt. el.	Brackets, Bze. Gold, with candles.
Office	2	5221	3 lt. el.	16" Semi-indirect fixture.
"	2	5532	2 lt. el.	Cast metal brackets, Bze. Gold finish.
Up. Cor.	24	W 204	1 lt. el.	14" Dish, short stem tassel, Bze. Gold.
Ent. Hall	15	"	1 lt. el.	12" " " " " " "
Parlors	21	W 205	6 lt. el.	Candle fix. w/ crystals & festoons, Bze. Gold.
"	60	W 206	2 lt. el.	Brackets, w/ mirror & candles, Bze. Gold.
Lar. Liv. Rms.	6	W 207	12 lt. el.	Special cast metal fixture, w/ cast arms, & candles, Bronze Gold finish.
" "	36	W 208	2 lt. el.	Brackets to match, w/ flat tubing arms & candles.

PLAINTIFF'S EXHIBIT "A."—Continued.

Sm. Liv. Rms.	13	W5255	6 lt. el.	Cast metal fix. w/ candles, Bze. Gold.
" "	54	W 202	2 lt. el.	Brackets to match, w/ candles, Bze. Gold.
Din. Rooms	21	W 199	6 lt. el.	Special cast fix. w/ candles, Silver finish.
" "	102	W 200	2 lt. el.	Candle Brackets.
Chambers	68	3414	1 lt. el.	14" Dish, stem & tassel, Bze. Gold finish.
"	205	5247	1 lt. el.	Candle brackets.
Foyers	6	5285	1 lt. el.	14" Dish.
"	35	5285	1 lt. el.	14" "
"	8	5511	1 lt. el.	Cast metal bracket, Bze. Gold finish.

Respectfully submitted,

EMPIRE LIGHTING FIXTURE CO., INC.,

By PERCY I. ANSORGE,
Pres.

Subject to minor changes agreeable to both parties.

Accepted:

J. E. TAYLOR & CO.,

By JAS. E. TAYLOR.

8

PLAINTIFF'S EXHIBIT "B."

Washington, D. C.

Empire Lighting Fixture Co.,
224 Centre St.,
New York City.

GENTLEMEN:

In consideration of one dollar, (\$1.00), to me in hand paid, and further consideration of my interest in the J. E. Taylor & Co.'s contract with the De Lux Apartment House, I hereby guarantee the payment of all goods and merchandise ordered from you, by J. E. Taylor & Co., for the De Lux Apartment House, according to schedules submitted under this date, for the sum of \$4,756.00.

Should J. E. Taylor & Co. fail to make payments according to terms on schedule, I will make such payments, for the account of J. E. Taylor & Co. to the Empire Lighting Fixture Co., the same as if I had purchased the merchandise for my own account.

Yours truly,
(Sgd.)

G. W. KERNODLE.

Witnessed this 17th day of July, 1916.

JAS. E. TAYLOR.

PLAINTIFF'S EXHIBIT "C."

Particulars of Demand.

J. E. Taylor & Company and George W. Kernodle to Empire
Lighting Fixture Co., Drs.

For lighting fixtures, as per agreement, as follows:

*Manufactured and Delivered to the De Luxe Apartment,
Washington, D. C.*

1916.

Nov.

30.	205	Bedrooms, #5247-2 el. Lt. Flem. drill for C. H. Switch, @\$3.00.....	\$615.00
68	"	#A-1 el. Lt. Flem. 18", see sketch dishes shipped from factory $\frac{3}{8}$ " hole, @\$4.00	272.00
41	Foyers	#W5285-1 el. Bronze Gold 18", @\$8.00	328.00
13	Small L. R.	#W5285-6 el. Bronze Gold 7/16" reeded arms, @\$12.50	162.50
54	" " "	#W202-2 el. Bronze Gold (Regular #5542) 7/16 reeded arms, for CH Switch, @\$5.20	280.80
39	Halls	#204-1 el. Bronze Gold see sketch, @\$3.50	136.50
			\$1,794.80
8 Cases, @\$1.25.....			10.00
3 Bbls. @ .75.....			2.25
			\$1,807.05

1916.

Dec.

16.	21	D. R. #199 fixtures, @\$15.00.....	\$315.00
102	D. R. Brackets	#W200, @\$4.50.....	459.00
60	Parlors	#W206 no prisms, @\$5.75.....	345.00
36	Large Living Room Brackets,	@\$8.00....	288.00
	6 Cases, @\$1.25		7.50
			\$1,414.50
Allowance on Cases			7.30
			\$1,407.20

10 *Manufactured and Prepared for Shipment and Tendered, but Shipment Withheld by Reason of the Fact that the Account for Previous Shipments Had Run Beyond \$1,500.00.*

Parlors	21	W205-6 Bze. Gold—7/16 reeded tubing, for crystals & festoons, but not included, \$15.50.....	\$325.50
Large L. R.	6	W-207-12 Bze. Gold, \$100.00.....	600.00
Ladies' Rm.	1	W193-4 " " \$25.00	25.00
" "	4	5245-2 " " Bkts., \$4.00..	16.00
Vestibule	2	Special Large lanterns, Gold & Black See PIA. W190, \$80.00.....	80.00
Pub. Cor.	2	W191-3 Gold & Black See PIA. W190, \$52.00	104.00
Small "	11	W192-3 Gold & Black See PIA., \$30.00	330.00
Foyers	8	5511-1 Bze. Gold, \$4.00.....	32.00
		All above to be bare, regular length.	
	65	Cutler Hammer Switches to be used for brackets, extra each \$.45....	29.25
			\$1,541.75

Totals, forwarded.

\$1,807.05

1,407.20

1,541.75

\$4,756.00

11

Plea of George W. Kernodle.

Filed September 8, 1917.

* * * * *

The defendant George W. Kernodle for plea to the declaration filed in the above-entitled cause, says that he did not promise as alleged therein.

LECKIE, COX & SHERIER,
Attorneys for the Defendant.

Affidavit of Defense.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

George W. Kernodle, one of the defendants mentioned in the declaration filed in the above-entitled cause, being first duly sworn on oath, states—

The plaintiff is not entitled to recover from him the sum of Forty-Seven Hundred and Fifty-Six Dollars (\$4,756.00) with interest, as claimed in the declaration, or any other sum whatever, the grounds of defense which this defendant relies upon, among others, and expects to prove at the trial of the cause being as follows:

In or about the month of July, 1916, the defendant corporation, J. E. Taylor & Company was negotiating with the plaintiff for the purchase of certain lighting fixtures to be manufactured by the plaintiff and furnished for a building being constructed by one Bates Warren in the District of Columbia called the De Luxe Apartment House.

12 The plaintiff on or about the 14th day of July, 1916, submitted to J. E. Taylor & Company an offer to supply the fixtures substantially in the form set out in exhibit "A" of the plaintiff's affidavit of merit, it being understood between the plaintiff and J. E. Taylor & Company that the offer should become binding upon the furnishing by the defendant J. E. Taylor & Company of security satisfactory to the plaintiff for the payment of the purchase price of said fixtures. This defendant on or about the time said offer was made was asked by J. E. Taylor & Company to guarantee payment for said fixtures and executed an undertaking in substantially the form of the letter set out on page one (1) of the plaintiff's affidavit of merit, to be delivered to and accepted by the plaintiff. This undertaking was not acceptable to the plaintiff and subsequently the defendant J. E. Taylor & Company requested this defendant to execute, and this defendant executed, in lieu thereof another letter of guaranty dated on or about July 17, 1917, in substantially the form of exhibit "B" attached to said affidavit, with the expectation that this new letter would be accepted as a guaranty. The plaintiff, however, declined to accept the said letter of July 17 (Exhibit "B") notifying the defendant J. E. Taylor & Company in writing on or about the 7th day of August, 1916, that—

"The information we are able to obtain about Dr. Kernodle's financial condition is not definite enough to warrant us in extending this large amount of credit."

Thereupon the defendant J. E. Taylor & Company having further suggested that the plaintiff accept this defendant's said letter of guaranty, the plaintiff on or about the 9th day of August, 1916,
13 again writing definitely declined to do so, saying—

"As explained to you Dr. Kernodle is very well thought of, but he has no rating, and is not established in business, which is the only reason we cannot accept him as guarantor on a large order in which there is so much special mould work, which we have taken on a very close margin of profit."

The plaintiff having thus definitely refused to accept this defendant as guarantor, thereupon another and independent arrangement was made to which said Bates Warren became a party and to which this defendant was not a party and by which it was provided that the purchase price of said fixtures should be paid directly to the plaintiff by said Bates Warren, for whose apartment house the fixtures were to be supplied, when and as the fixtures were delivered. And it was

under this arrangement with said Bates Warren, and not under any arrangement with the defendant that the plaintiff undertook to supply the fixtures for the said De Luxe Apartment House.

The defendant accordingly denies that he entered into any contract or agreement of any kind with the plaintiff, or made any promise to it as alleged in said affidavit of merit, or that the plaintiff manufactured or supplied to J. E. Taylor & Company or for said De Luxe Apartment House any fixtures in reliance upon any promise, undertaking or obligation on the part of this defendant.

GEORGE W. KERNODLE.

Subscribed and sworn to before me this 6th day of September, 1917.

[SEAL.]

GERTRUDE ELLIS,
Notary Public, D. C.

14

Pleas of J. E. Taylor and Company.

Filed September 14, 1917.

* * * * *

The defendant, J. E. Taylor and Company, for plea to the declaration filed in the above-entitled cause, says that it is not indebted in the manner and form as alleged in said declaration.

2. And for further plea the said defendant says that it did not promise as alleged in said declaration.

WM. HENRY WHITE,
Attorney for Defendant, J. E. Taylor & Company.

Affidavit of Defense for Defendant J. E. Taylor & Co.

* * * * *

Norman I. Taylor, being first duly sworn, upon oath deposes and says:

He is the secretary of J. E. Taylor & Company, the defendant corporation named in the declaration filed in the above-entitled cause.

At the time of the happening of the events alleged in the declaration, James E. Taylor, a brother of affiant, was president of defendant corporation and actively engaged and in charge of its management and in charge of making contracts of purchase and sale including electric wiring and electric fixtures and of installing the latter. Said James E. Taylor died on January 1st, 1917, since which time affiant has been in the active management of said defendant's business.

15

Affiant has found in the files of defendant's office a copy of a contract entered into by said James E. Taylor for and on behalf of defendant corporation with one Bates Warren of the District of Columbia, which contract, among other things, required defendant corporation to furnish and install certain electric lighting fixtures in a certain apartment house then being erected by said Bates

Warren at 2029 Connecticut Avenue, Northwest, Washington, D. C., and said contract further provided:

"All the fixtures to be furnished are to be cast brass with the exception of the fixtures to be installed in the corridors and under the entrances, which are to be of black iron.

It is also understood and agreed by us that the material and workmanship for fixtures to be furnished are to be of the same grade and high character as the fixtures manufactured by the Sterling Bronze Company of New York and that before we shall expect payment for same, they are to be made entirely satisfactory to you."

Affiant is informed and believes that before entering into said contract, said James E. Taylor notified said Empire Lighting Fixture Company, the plaintiff, of the kind of fixtures to be required by said Warren in said building; that defendant corporation does not manufacture electric lighting fixtures, but its business is limited to wiring and "hanging" or installing such fixtures manufactured by others, all of which was known to plaintiff and said Warren; that plaintiff is a manufacturer of such fixtures; that plaintiff sent its president, one Percy I. Ansorge, to Washington with authority to act for it in entering into a contract to manufacture the said fixtures required by said Warren; that said James E. Taylor and said Ansorge went together, as affiant is informed and believes, to the office of said

16 Warren and there talked with the latter's representative, one William L. Browning; that said Browning then and there told said Taylor in the presence of said Ansorge, what kind and quality of fixtures would be required and among other things that they were to be made of brass with the exception of those for the corridors and entrances and that they were to be of the same grade and high character as those manufactured by the Sterling Bronze Company; that while exhibit "A" to the declaration is silent as to the material of which the fixtures therein mentioned and to be furnished by plaintiff were to be made, affiant is informed and believes that it was understood by plaintiff and Warren and James E. Taylor that they were to be made of cast brass with the exceptions above-mentioned and were to meet the requirements of said Warren in other respects and were to be made for and were to be installed in the said apartment house then being constructed by said Warren.

Affiant further says that the correspondence set out as exhibits to the declaration and included in plaintiff's affidavit is not the whole of the same; that plaintiff replied to exhibit "B" declining to accept defendant Kernodle as guarantor or to enter into any contract with defendant corporation except on terms and assurances of payment to plaintiff to be made and to be satisfactory to plaintiff; that a new arrangement was then or thereafter made by which said fixtures were sold, not to defendant corporation, but to said Bates Warren, and such of them as were shipped were shipped to him instead of to defendant corporation. In form this sale was an order drawn by

17 defendant corporation upon said Warren for \$5,000 in favor of plaintiff to be paid by said Warren's giving his promissory notes to plaintiff in certain named sums from time to time when shipments to him aggregated said sums at the prices thereto-

fore named to defendant corporation by plaintiff; that said Warren duly accepted said order and agreed to make said payments accordingly excepting only with the condition that the fixtures were according to agreement as above stated. Thereafter, on, to-wit, October 28, 1916, plaintiff notified defendant corporation of its intention to explain to said Browning the advantages of using white metal instead of brass in making said fixtures to which defendant corporation replied on October 30, 1916, that plaintiff could use its own judgment about "explaining the advantages of white metal as against brass" and to this plaintiff replied on November 1, 1916, as follows:

"Mr. Browning was in to see us Tuesday, and we believe that we satisfied him as to deliveries and quality of fixtures."

Affiant further says that the fixtures manufactured by plaintiff pursuant to the above understanding and in part shipped to said Warren and in part attempted to be delivered later were not made of brass alone, but were made in large part of some composition of metals or substances other than brass. Defendant corporation relied upon the above assurances of plaintiff and the fact of the sale of said fixtures to said Warren and it duly assembled, wired and installed such fixtures as were supplied by plaintiff, in said apartment house and heard no complaint as to the quality until long after it became necessary for said Warren to procure fixtures elsewhere to complete his apartment house, as hereinafter set forth.

18 Affiant further says that plaintiff knew when it undertook to manufacture and furnish said fixtures that they were to be installed in the apartment house then being erected by said Warren and would have to be delivered at such time as in the erection of the building they were required and it was a part of the agreement of purchase of same that they would be delivered at such time; but plaintiff failed to deliver them or any part thereof at such time; on the contrary, a long time, to-wit, months were allowed by plaintiff to elapse after said time before any of said fixtures were delivered; that a part only of them were ever shipped and those were shipped to said Warren and they were not complete and the assortment was such that no apartment could be completed with them. Defendant corporation duly and frequently complained of the above failure to plaintiff and notified it of the damage resulting to said Warren and the corporation defendant. It finally became necessary for defendant corporation to procure fixtures elsewhere, which it did, and said Warren was compelled to procure others elsewhere than from plaintiff and defendant corporation, which he did, to complete his said building.

Affiant further says that said Warren has refused to pay anyone for said fixtures and has refused to pay the corporation defendant moneys due it by him for this and other work because he asserts that the fixtures delivered are not made of brass and are not of the same grade and high character as those manufactured by the Sterling Bronze Company, but are greatly inferior thereto, and because the unreasonable delays which occurred in delivering such as were de-

livered and plaintiff's failure to deliver others resulted in
 19 serious loss and damage to him and made it impossible for
 him to complete his said apartment house when it would
 otherwise have been completed.

Affiant further says that no such contract as the one alleged in the
 declaration was entered into between the plaintiff and defendants
 or either of them; that plaintiff did not fulfill its part of the agree-
 ment which was made and that neither of the defendants are in-
 debted to the plaintiff in the sum as alleged in the declaration nor in
 any other sum whatsoever because of any of the matters and things
 mentioned in said declaration nor for any other cause.

NORMAN I. TAYLOR.

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me this 13th day of September,
 1917.

[SEAL.]

JESSE E. POTBURY,
Notary Public, D. C.

Joinder in Issue.

Filed October 11, 1917.

* * * * *

The plaintiff joins issue on the pleas of the defendants J. E. Taylor
 & Company, a corporation, and George W. Kernodle.

20

Memorandum.

March 13, 1919.—Verdict for Plaintiff for \$3,214.25, with interest
 from February 1, 1917.

Supreme Court of the District of Columbia.

Thursday, March 27th, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Staf-
 ford, Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record
 and the motions of said defendants filed herein for a new trial are
 argued and submitted to the Court, upon consideration whereof it is
 ordered that said motions be, and the same are hereby severally over-
 ruled and judgment on verdict is ordered. Wherefore, it is con-
 sidered that the plaintiff recover herein of the defendants the sum
 of Three Thousand Two Hundred Fourteen and 25/100 (\$3,214.25),
 — with interest thereon from the first day of February, 1917, to-
 gether with costs of suit to be taxed by the clerk and have execution
 thereof.

From the foregoing judgment the defendants in open court by their respective attorneys of record severally note an appeal to the Court of Appeals and the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of Four Thousand Dollars.

21

Memoranda.

April 18, 1919.—Supersedeas bonds approved and filed.

April 28, 1919.—Time to submit Bill of Exceptions extended from day to day to and including February 2, 1920.

January 31, 1920.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

Monday, June 14th, 1920.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * *

Before Judge Stafford.

The Court having this day signed the bill of exceptions taken at the trial of this cause and heretofore submitted as of the time of the noting thereof at the trial, now hereby orders the same of record nunc pro tunc.

22

Assignments of Error.

Filed June 30, 1920.

* * * * *

Come now the defendants, J. E. Taylor & Company, and George W. Kernodle, appellants, and assign for review on appeal, errors committed by the Trial Court in the following particulars:

1. In refusing, upon objection of the plaintiff, the defendant, J. E. Taylor & Company's first, second, third, fourth, fifth, sixth, seventh, eighth and ninth instructions.

2. In refusing, upon objection of the plaintiff, to grant the defendant, Kernodle's instructions numbered one, two, three, four and five.

WM. HENRY WHITE,
LECKIE, COX & SHERIER,
Attorneys for the Defendants.

Designation of Record.

Filed June 30, 1920.

* * * * *

The Clerk, in preparing the transcript of record in the above-entitled cause, will embody therein the following, to-wit:

1. The declaration.
2. Pleas, replications thereto and joinders of issue.
3. The verdict.
- 23 4. Order overruling motions for new trial; judgment on verdict; notice of appeal in open court by defendants; motion of supersedeas.
5. Notice of approval of filing of appeal bond.
6. Memorandum of order, or orders, if any, extending the time for submission of bill of exceptions.
7. Memorandum of submission of bill of exceptions and signing of bill of exceptions; order making bill of exceptions a part of record; (copy of bill of exceptions which was signed in duplicate, to be filed in the Court of Appeals.)
8. Memorandum of order, or orders, if any, extending time for filing transcript of record.
9. This designation; and assignments of error.

WM. HENRY WHITE,
LECKIE, COX & SHERIER,
Attorneys for Defendants.

24 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 60437 at Law, wherein Empire Lighting Fixture Co. Inc., a Corporation is Plaintiff and J. E. Taylor & Company, a corporation and George W. Kernodle are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of July, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.
E. W.

25 In the Supreme Court of the District of Columbia.

Law. No. 60437.

EMPIRE LIGHTING AND FIXTURE COMPANY, INC., a Corporation,
Plaintiff,

vs.

J. E. TAYLOR & COMPANY, a Corporation, and GEORGE W. KERNODLE,
Defendants.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Stafford and a jury, on March 11, 1919, Messrs. Bynum E. Hinton and Joseph H. Bilbrey appearing on behalf of the plaintiff, Mr. William Henry White on behalf of the defendant J. E. Taylor & Company, and Mr. Joseph T. Sherier on behalf of the defendant George W. Kernodle.

Thereupon in open court by stipulation of counsel for the respective parties all questions of the form and sufficiency of the respective pleadings were waived.

Thereupon, Percy I. Ansorge, being duly sworn as a witness on behalf of the plaintiff, testified in substance as follows:

He was the president and cashier of the plaintiff, a New York Corporation, in 1916, and as such had negotiations with J. E. Taylor & Company with respect to lighting fixtures. The witness thereupon identified a paper presented to him, dated at New York, July 14, 1916, which said paper was then received in evidence, read to the jury, and is as follows:

"New York, July 14, 1916.

J. E. Taylor & Co.,
1324 Eye St., N. W.,
Washington, D. C.

GENTLEMEN:

We hereby agree to furnish, f. o. b. New York, the following fixtures, not wired, without sockets & joints, for the net agreed sum of Forty-seven Hundred and Fifty-six Dollars (4,756.00), terms: 30 days from date of shipment, payment to be anticipated if account runs beyond Fifteen Hundred Dollars, (\$1,500.00).

26

Porticos	2	#W 190	4 lt. el.	Lantern, Gold and Black finish.
Pub. Cor.	2	W 191	6 lt. el.	Semi-indirect fixture, Gold & black finish.
Small Cor.	9	W 192	3 lt. el.	" " " " " "
Ret. Rm.-men	1		4 lt. el.	16" Marbolite dish, Bronze Gold finish.
" "	4		1 lt. el.	Cast metal brackets.
Lt. Ret. Rm.	1	W 193	4 lt. el.	Semi-indirect fixture, Bronze Gold finish.
" "	4	5245	2 lt. el.	Brackets, Bze. Gold, with candles.
Office	2	5221	3 lt. el.	16" Semi-indirect fixture.
"	2	5532	2 lt. el.	Cast metal brackets, Bze. Gold finish.
Up. Cor.	24	W 204	1 lt. el.	14" Dish, short stem tassel, Bze. Gold..
Ent. Hall	15	"	1 lt. el.	12" " " " " "
Parlors	21	W 205	6 lt. el.	Candle fix. w/ crystals & festoons, Bze. Gold.
"	60	W 206	2 lt. el.	Brackets, w/ mirror & candles, Bze. Gold.
Lar. Liv. Rms.	6	W 207	12 lt. el.	Special cast metal fixture, w/ cast arms, & candles, Bronze Gold finish..
" "	36	W 208	2 lt. el.	Brackets to match, w/ flat tubing arms & candles.

Sm. Liv. Rms.	13	W5255	6 lt. el.	Cast metal fix. w/ candles, Bze. Gold.
" "	54	W 202	2 lt. el.	Brackets to match, w/ candles, Bze. Gold.
Din. Rooms	21	W 199	6 lt. el.	Special cast fix. w/ candles, Silver finish.
" "	102	W 200	2 lt. el.	Candle Brackets.
Chambers	68	3414	1 lt. el.	14" Dish, stem & tassel, Bze. Gold finish.
"	205	5247	2 lt. el.	Candle brackets.
Foyers	6	5285	1 lt. el.	16" Dish.
"	35	5285	1 lt. el.	14" Dish.
"	8	5511	1 lt. el.	Cast metal bracket, Bze. Gold finish.

Respectfully submitted,

EMPIRE LIGHTING & FIXTURE CO., INC.,
By PERRY I. ANSORGE, *Pres.*

Accepted:

J. E. TAYLOR & CO.,
By JAS. E. TAYLOR.

Subject to minor changes agreeable to both."

The witness then identified a paper signed by the defendant Kernodle, dated July 17, 1916, which was offered in evidence, and read to the Jury. It was as follows:

“Washington, D. C.

Empire Lighting Fixture Co.,
224 Centre St.,
New York City.

GENTLEMEN:

In consideration of one dollar (\$1.00), to me in hand paid, and further consideration of my interest in the J. E. Taylor & Co.'s contract with the De Lux Apartment House, I hereby guarantee the payment of all goods and merchandise ordered from you, by J. E. Taylor & Co., for the De Lux Apartment House, according
27 to schedules submitted under this date, for the sum of \$4,756.00.

Should J. E. Taylor & Co. fail to make payments according to terms on schedule, I will make such payments, for the account of J. E. Taylor & Co., to the Empire Lighting Fixture Co., the same as if I had purchased the merchandise for my own account.

Yours truly,

G. W. KERNODLE.

Witnessed this 17th day of July, 1916.”

The witness testified that the writing signed by Kernodle related to the fixtures mentioned in the writing of July 14, 1916 previously offered. After the execution of the contract of July 14, 1916 and receiving the guarantee previously offered in evidence, the plaintiff had a number of working drawings made for the different fixtures mentioned in the schedule of July 14, 1916, which drawings were mailed to defendant J. E. Taylor & Company, for approval. After receiving letters back with respect to the working drawings the plaintiff made moulds and tools and proceeded to the manufacture of the fixtures. The fixtures were packed in cases and the first cases were delivered to a truck line to be taken to the pier in New York. They were addressed to J. E. Taylor, care of Bates Warren, because they were to be delivered to an apartment house constructed by Warren. The deliveries were started Nov. 4 and were made every few days until December 16, 1916. The witness thereupon identified copy of the shipping bills covering the deliveries of fixtures to the truck line in New York, which copies showed that the fixtures were shipped “to Bates Warren in care of J. E. Taylor & Co.” The witness thereupon testified that the bill was erroneous and should read “J. E. Taylor, care of Bates Warren.” The bill was dated Nov. 30, and was a summary of two or three shipments made during month of November. The items included in said bill were 205 bedroom fixtures @\$3.00 each, \$615.00; 68 bedroom fixtures @\$4.00 each, \$272.00; 41 foyer fixtures @\$8.00 each, \$328.00; 54 small living room fixtures @\$5.20 each, \$280.80; 39 hall fixtures @\$3.50 each, \$136.50; 13 small living room fixtures—six light—at \$12.50 each, \$162.50,—totalling \$1,794.80. The plaintiff then offered in evidence two bills

28 dated November 30 and December 16, 1916, covering fixtures delivered to the truck line for shipment to Bates Warren care of J. E. Taylor & Co. Norman I. Taylor, who represented J. E. Taylor & Co. subsequently told the witness that the fixtures mentioned in the bills of November 30 and December 16, 1916, amounting to \$3,202.30, were received. The fixtures contained in the schedule of July 14, other than those delivered, are in the possession of plaintiff in New York. The plaintiff had on hand December 5, 1916, ready for delivery to the defendant, 21 parlor fixtures @\$15.50 each, \$325.00; 6 large living room fixtures @\$100.00 each, \$600.00; 1 ladies' room fixtures at \$25.00; 4 ladies' room brackets @\$4.00 each, \$16.00; 2 vestibule fixtures at \$80.00; 2 public corridors @\$52.00 each; 11 small corridors at \$30.00 each, \$330.00; 8 foyers @\$4.00 each, \$32.00; 65 switches @45¢ each, \$29.25; making a total of \$1,541.75. These values were in accordance with estimates furnished defendant corporation prior to execution of contract of July 14, 1916. Witness was then asked what part of sum of \$4,756.00 mentioned in contract is represented by goods still in possession of plaintiff, to which question the defendants objected, but the court overruled the objection, to which action of the court the defendants excepted and said exception was then and there entered on the minutes of the trial justice. The witness thereupon testified that fixtures representing \$1,541.00 of the contract price due to the Taylor Company under the contract of July 14, 1916, were still in the hands of the plaintiff. The witness was then asked whether the fixtures in question were of standard or special make, to which question the defendant objected on the ground that it was immaterial, but the court overruled the objection and allowed the witness to answer, to which action of the court the defendants excepted and said exception was then and there entered on the minutes of the court. The witness then answered that the fixtures were specially made. The market value of the fixtures on hand about the middle of December 1916, was \$470.00. No payments have been made on account of the fixtures in question, although demands had been made upon the J. E. Taylor Co.

29 On cross-examination, the witness testified in substance as follows:

On July 12, 1916 the plaintiff wrote the defendant corporation, sending it schedule of fixtures, and among other things saying, "please give this order your prompt attention, and mail us an acceptance in which you will make some satisfactory arrangement as to payments." On July 13, 1916, the defendant corporation sent plaintiff a form of guarantee, signed by defendant Kernodle, in the following form: "I hereby guarantee the payment of all bills for goods sold to J. E. Taylor & Co., relative to the De Lux Apartment House contract, for fixtures delivered and approved, according to the terms agreed upon." At the bottom of this letter the names of several persons were given as reference regarding the financial condition of the defendant Kernodle. In the letter of transmittal, the defendant cor-

poration said: "We are enclosing herewith a personal agreement and guarantee, signed by our treasurer, Dr. G. W. Kernodle, who you can very easily get a report on." On July 14, 1916, the plaintiff wrote defendant corporation, inclosing corrected schedule and asking that same be promptly signed and returned to the plaintiff; also saying "in reference to the guarantee and terms of payment, the suggestion made by you is not entirely satisfactory. We must have assurance from you that payment will be made, by check, promptly within thirty days from the date of shipment, as we cannot afford to finance a job of this size any longer than this period of time. * * *

The guarantee is not in good form, and we would request that you have Dr. G. W. Kernodle sign the enclosed form, and return to us promptly." The form of guarantee inclosed in plaintiff's letter of July 14, 1916, was that sued upon here. On August 7, 1916, the plaintiff wrote the defendant corporation as follows: "When you were last in New York, the writer spoke to you about the question of credit on the De Lux job. The time has now come when we must push this job forward with all speed, and as explained to you, the

30 information we are able to obtain about Dr. Kernodle's financial condition is not definite enough to warrant us in extending this large amount of credit. As the bulk of the fixtures will be required at about the same time, it is not feasible to place a small credit limit on this order. We ask that you make this transaction a cash proposition, the same as you are buying your electrical supplies, and in order to assist us in the heavy initial expense for moulds and patterns, we request you to please send us a two-month's note, endorsed by Dr. Kernodle for \$500.00, and also send us your acceptance of a change in the terms, wherein you agree to pay Sight Draft, Bill of Lading, for fixtures. * * * We hope that you will be able to make arrangements along the lines suggested and that we will hear from you within the next few days, so as not to delay the progress of the work."

On August 8, 1916, the defendant corporation wrote plaintiff, the material portion of which letter is as follows: "Regarding the credit proposition, we will take this matter up with our Dr. Kernodle, in the meantime, and as soon as samples are received and approved, we will be in a position to advise you regarding terms. We are not sure the attitude our Dr. Kernodle will assume. He is worth the money and he knows it, and constant change of terms on well rated individuals of his metal are irritating, and we regret very much to have to take this matter up with him again."

On August 9, 1916, the plaintiff wrote defendant corporation, the material portions of which letter are as follows: "We cannot see that Dr. Kernodle should be irritated because of a change in the terms, as we have explained our position very fully, and you are in error when you state that Dr. Kernodle is very well rated. As explained to you, Dr. Kernodle is very well thought of, but he has no rating, and is not established in business, which is the only reason we cannot accept him as guarantor on a large order in which there is so much special mould work, which we have taken on a very close margin of profit."

31 On August 21, 1916, the plaintiff wrote defendant corporation and among other things said "try to get the financial proposition satisfactorily adjusted." On August 29, 1916, plaintiff wrote defendant corporation, among other things saying: "The progress on your contract is somewhat delayed because we have not made satisfactory arrangements as to payment. If Mr. Bates Warren will accept an order upon him for the full amount of our contract, payments to be made upon each delivery, we will accept this arrangement, provided we can get some satisfactory information regarding his financial standing, as we are not familiar with his financial responsibility, as we are not familiar with Washington people, as you are. Please get this matter adjusted at your earliest convenience, so that we may proceed with your order."

On September 8, 1916, defendant corporation wrote plaintiff as follows: "Replying further to your letter of August 29th, would say that we had the matter of an Order up with Mr. Bates Warren, and he has advised us that he will accept an order for the full amount of your contract, but payments will not be made on same until fixtures are installed in the building. The building however, is ready for fixtures, and we have already assembled and are ready to deliver fixtures other than those to be furnished by you, and we expect to start installing fixtures on this job during the coming week. We wrote you last week to get a line on Mr. Warren so that you would be in a position to settle this matter definitely at once, and we now ask that you give us an immediate reply to this letter, and advise us the exact progress of the work at the present time on the fixtures. We will want as many of them as you can give us right away."

On September 13, 1916, plaintiff wrote defendant corporation, and among other things said: "In answer to your letter of September 8th, we obtained information about Mr. Bates Warren, and will be willing

32 to accept his order, but we do not know how we can arrange payments to only be made after fixtures are installed in the building. We would expect payment upon delivery. * * * If you will get this contract in such shape that we are guaranteed with our payments, and get Mr. Warren to accept fixtures similar but not identical with the sketches submitted, we will proceed with the order with all possible speed, but until we hear definitely from you we cannot make any promises."

On September 30, 1916, plaintiff wrote defendant corporation as follows: "In answer to your recent letter and telegram of even date, we can only advise you that we are awaiting an acceptance of our conditions as stated fully in our letter of September 13th, and that while waiting for your reply, we have not done any work on your order in the last few weeks, because the question of payments was not settled, and furthermore, because we have not been working due to the fact that there was a strike in our factory, starting September 15th. If you will make arrangements about guaranteeing our payments, we will try to rush through that part of your order which does not require new moulds, as we are not in a position to make up fixtures requiring new moulds until six or eight weeks' time."

In October, 1916, the witness signed on behalf of the plaintiff, a writing in form and tenor following:

"October 2nd, 1916.

Mr. Bates Warren,
406 Southern Building,
City.

DEAR SIR:

In connection with our contract with the Empire Lighting Fixture Co., 224 Centre Street, New York City, N. Y., please pay to the order of the Empire Lighting Fixture Co., the sum of Five Thousand (\$5,000.00) dollars, and charge same to our contract with you for Lighting Fixtures at the De Lux Apartment Building, 2029 Conn. Ave., N. W., Washington, D. C. and oblige,

Yours very truly,

J. E. TAYLOR & CO.
N. I. TAYLOR,
Sec.

33

"Washington, D. C., October 3rd, 1916.

I hereby accept the above order and agree to pay the same upon delivery of the fixtures at the above mentioned building and in the manner stated below, and also upon the condition that the fixtures delivered are in accordance with the contract entered into between myself and J. E. Taylor & Co. The amount to be paid to be based upon invoices covering shipments but each installment of payment to be not less than \$1,500; all payments to be made in promissory notes signed by me to the order of the Empire Lighting Fixture Co., payable 30 days after date, and to bear interest at 6% per annum until paid.

BATES WARREN.

Accepted except as to conditions of contract between J. E. Taylor & Co. and Bates Warren, which are not familiar to us.

EMPIRE LIGHTING FIXTURE CO.,
PERCY I. ANSORGE,
Pres."

October 4th, 1916."

On February 17, 1917, plaintiff wrote defendant Kernodle, among other things saying: "We regret that in the J. E. Taylor & Co. transaction, we must demand that you arrange to pay us for merchandise delivered on contract of July 14th, 1916, amounting to \$3,221.55, payment of which you guaranteed on July 17th, 1916."

On February 20th, 1917, plaintiff wrote Kernodle in part, as follows: "Your letter of February 19th to hand. You are mistaken, as at no time did we release you. After we received the guarantee from you, we refused to make shipments unless we received additional security. All correspondence regarding the guarantee and terms of payment on the J. E. Taylor Co. contract asked for additional security and the fact that Mr. Bates Warren agreed to make payment to us direct, did not in any way relieve you of your responsibility to us."

No demand was made upon Kernodle until after plaintiff failed to get payment from J. E. Taylor & Co. and Warren. Plaintiff had written to Warren once or twice and had demanded payment of him over the telephone before making demand on Kernodle. Did not take up with Kernodle by letter the matter of paying until after

34 Warren made the claim that the fixtures were not of the quality required by his contract and could not remember whether he orally demanded payment, but thought he did.

The matter of Kernodle becoming guarantor was first suggested by J. E. Taylor in Washington in Kernodle's presence. Knew nothing of Kernodle financially at that time except what Taylor told him. Taylor told him that Kernodle had a lot of money invested in the Taylor Company, and was supervising all the expenditures of the Company; that he was the financial man and took charge of financial matters. At the time Kernodle's name was suggested he told Taylor "you can also let Dr. Kernodle give you references and if the references are satisfactory it will be all right with us. Otherwise we may want some additional guarantee." After this conversation plaintiff made its own investigation of Kernodle's financial standing. The principal contract was modified with respect to payments on account of the fixtures, by the acceptance of Warren's agreement to give his notes for the amount due the plaintiff. Witness did not know whether this modification was consented to by Kernodle.

Whereupon, the defendants to maintain the issues on their part joined, produced as a witness, G. W. KERNODLE, who being first duly sworn, testified as follows:

That he never consented to the making of any changes whatever in respect to payments or the substitution of Bates Warren as guarantor or debtor in the contract between J. E. Taylor & Company and the Empire Lighting Fixture Company. That the matter of the guaranty signed by the witness was handled by J. E. Taylor, who went to New York, saw Mr. Ansorge and got the prices and terms. Taylor came back from New York and told the witness the circumstances, and asked the witness if he would guarantee the payments under this proposition. Witness told him he would, and thereupon made the guaranty on that basis. Ansorge, after making his investigations, came back with a counter-proposition, which witness would not accept. On cross-examination, he stated the counter-proposition that he refused to accept was contained in the letter dated August 7, 1916, in which it was proposed by the plaintiff that the terms of payment be changed by defendant giving its note at two months for \$500 endorsed by Kernodle and agree to pay sight draft
35 as fixtures were delivered.

Thereupon, NORMAN I. TAYLOR, a witness on behalf of the defendants, being duly sworn, testified in substance, as follows:

36 He knew of the understanding about the defendant Kernodle becoming guarantor on the contract in this case, and that Kernodle was to be investigated and if found satisfactory financially, he would be accepted. If he was not found to be

satisfactory financially, then the matter died right there—there was nothing to be done at all. There was nothing said about getting additional security if Dr. Kernodle was not satisfactory. The letters identified by the witness Ansorge and heretofore mentioned, were then offered in evidence on behalf of the defendant. That the guaranty signed by Dr. Kernodle was sent to the plaintiff. When the letter of the plaintiff corporation dated August 9, 1916, was received by the defendant corporation, it was referred to the defendant Kernodle. On October 4, 1916, the witness had a conversation with Mr. Ansorge in New York. Witness was then asked to give the conversation, to which the plaintiff objected; said objection was overruled by the Court and an exception duly noted. Witness thereupon testified that Mr. Ansorge during that conversation said that the plaintiff was unable to accept Dr. Kernodle for the reason that he was not actively engaged in business and not sufficiently rated. That conversation took place as late as October 4, 1916. The witness understood that the plaintiff was not relying at all upon the guaranty of Dr. Kernodle, and that there was a definite rejection by the plaintiff of that guaranty. He understood that the guaranty then died a natural death—it was useless. The witness reported to Dr. Kernodle that the plaintiff was not relying upon him. Kernodle did not consent to the changes made in the principal contract with respect to the dates of delivery and the matter of payment.

WILLIAM L. BROWNING, a witness on behalf of the defendants, being first duly sworn, testified by deposition, in substance, as follows:

37 He was associated with Bates Warren at the time the apartment house known as 2029 Connecticut Avenue was in course of construction, and that he had charge of the negotiation of all contracts for building and general construction for Mr. Warren. Witness identified paper handed him as a contract between J. E. Taylor & Co. and Bates Warren for certain electrical fixtures to be installed in the building above mentioned. That he knew Percy I. Ansorge and saw him in Mr. Warren's office in connection with the execution of the contract between J. E. Taylor & Co. and Bates Warren. This was some six weeks or two months prior to June 30, 1916. Mr. James E. Taylor brought Mr. Ansorge into Mr. Warren's office. Mr. Warren came in and met Mr. Ansorge but witness could not recall that he stayed there during any conference. At that time Mr. James E. Taylor and Mr. Ansorge and the witness talked generally of the character of the fixtures Mr. Warren wanted in the building. It was a very high type of building—everything that was going in there should be of the very best. The apartments were very large and would be occupied by people who would criticize very severely, particularly the lighting fixtures. During the conversation the witness brought out the fact that these were brass fixtures; that the designs they were examining were from the Sterling Bronze people, and if J. E. Taylor & Co. were to furnish the fixtures, they would have to be in the exact duplicate of these designs. That Ansorge was present in the room and was near enough to hear what

was said. The conversation was part of a conference between Ansorge, J. E. Taylor and the witness. It was never proposed by J. E. Taylor or Ansorge to furnish anything other than brass fixtures. Nothing else was every discussed. The contract between Warren and J. E. Taylor Co. provided that the material and workmanship of the fixtures should be of the same grade and high character as the fixtures manufactures by the Sterling Bronze Co. of New York. Also that the fixtures to be furnished were to be cast brass, with the
38 exception of fixtures in corridors and under entrances, which were to be black iron. Those features of the contract were discussed at the conference of the witness, J. E. Taylor and Ansorge. This was all made clear in Mr. Ansorge's presence.

On or about October 30, 1916, the witness called at the place of business of the Empire Lighting Fixture Co. in New York, and there saw Mr. Ansorge. Mr. Ansorge stated that they had a good deal of difficulty in getting models made for the fixtures and had experienced delay in getting some other material, but that things at that time were coming along very finely—a good many fixtures were in the process of being made in his shop, and that deliveries would be made within a reasonable time thereafter. Witness was anxious to see some of the fixtures in process of being made, as he had his doubts that they were really being made, but Mr. Ansorge said they were in separate parts in the factory room and that witness could not tell anything about them. Nothing was said at that time as to the material which was to be used in making the fixtures. Nothing was said at that time by Ansorge as to change from brass to white metal, or any other metal than brass, to be used in the fixtures.

On cross-examination the witness testified that during the conference in Mr. Warren's office, Ansorge was making sketches, and Mr. Taylor was there with him. The witness and Taylor were standing right over Ansorge, discussing the designs,—the nature of them and the nature of the fixtures. The witness told Mr. Norman I. Taylor that the fixtures furnished were not cast brass but were white metal. Mr. Taylor seemed to be surprised and taken back that the contract with Mr. Warren called for brass.

39 Thereupon, NORMAN I. TAYLOR, a witness called on behalf of the defendant corporation, being first duly sworn, testified in substance as follows:

That in conversation with Mr. Ansorge on October 4, 1916, Mr. Ansorge declined to make any shipments under the principal contract until the order was signed by Bates Warren, and no shipments were made until that order was finally signed. The shipments were all billed and shipped to Bates Warren care of J. E. Taylor & Co.

On cross-examination the witness stated that plaintiff's letter of October 28, 1916, made no particular impression on him.

Thereupon PERCY I. ANSORGE, witness for the plaintiff testified in rebuttal that he knew nothing of the terms of the contract between J. E. Taylor & Company and Bates Warren. The plaintiff thereupon introduced the following telegram and letters which appellee

over the objection of the appellant insists be set out in full in this bill of exceptions:

"Washington, D. C., October 5-16.

Empire Lighting Fixture Co.,
224 Center St., New York:.

Start Work per agreement yesterday see letter tomorrow further instructions.

J. E. TAYLOR & CO."

"October 28, 1916.

J. E. Taylor & Co.,
1324 Eye Street, N. W.,
Washington, D. C.

GENTLEMEN:

After talking to you over the telephone today, I consider that it is inadvisable to evade the question whether the fixtures are to be made of Brass or White Metal. There is no doubt that after all the fixtures are installed, that someone connected with the operation will find out that the fixtures are not of cast brass, as anyone connected with the lighting fixture or metal industries can tell, from appearance, the difference between these two metals. We therefore think that it would be better to explain to Mr. Browning on his visit here, the advantage of using White Metal, and show him a number of highest class apartment houses in this city using White Metal today, not because it is cheaper, but because it is better.

Should your contract with Mr. Warren stipulate specifically that brass is to be used through, we are quite sure that you will have difficulty in obtaining payments, and suggest that the matter be thrashed out now, and that you take the matter up in Washington at your end, and I will take it up with Mr. Browning here in New York City, this coming week.

40 Yours truly,

EMPIRE LIGHTING FIXTURE CO., INC."

Per ———.

P. I. A./H. C. H.

"Washington, D. C., Oct. 30th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

Replying to your favor of October 28th, you can use your own judgment about explaining the advantages of white metal as against brass. It is not a point at this time, however, and we will have no opportunity of going into the matter with him before he leaves.

The principal point at this time is delivery. Your delay has placed us in a very embarrassing position and we do not want Mr.

Browning to know the condition of your work at the present time, because we are ashamed of it, and have no excuse to offer. We have done everything we know how to hurry you along and we feel that at the present time you are no closer to making a delivery than you were when you took the contract.

We trust that you will show Mr. Browning every consideration, and hope that you can show him that you have a shipment ready. If you can't we fear trouble. We are so thoroughly disgusted with your business methods that unless you make us a showing within ten days we will be obliged to take some action to relieve this situation. We cannot and will not stand it any longer.

Yours very truly,

(Signed)

J. E. TAYLOR & CO."
N. I. TAYLOR.

"Washington, D. C., Nov. 7th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

We are pleased to note that shipment of brackets would be made today, and trust that you will continue the good work.

In connection with the extension of time on deliveries we took the matter up with you in our letter of November 2nd. As you are now more than two weeks behind the schedule we think that if shipments are made continuously even though you remain from ten days to two weeks back of the time agreed upon, there will be no more complaint, as long as shipments keep coming. While we are willing

41 now under the circumstances to allow you ten days or two weeks' more time than agreed upon, the owners are the people now who will dictate whether or not our deliveries are satisfactory, and unfortunately we have not the say in the matter.

We do not anticipate any trouble, but suggest that you forward your invoices as quickly as possible, and attach a duplicate of the B/L to same.

Yours very truly,
(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR."

"Washington, D. C., Nov. 14th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

We have installed all the fixtures you sent us, and are anxiously awaiting some more. Please get another shipment started as soon as possible.

Yours very truly,
(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR."

"Washington, D. C., Nov. 22nd, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

We received shipment of Bed room brackets containing the following articles:

- 400 Candle Cups.
- 205 C. H. Switches.
- 410 Candle nipples.
- 181 Bracket Plates.

This would seem to leave a shortage of
10 candle cups.
24 cast plates.
210 candles.
210 Bobaches.

We have had no answer to our letter of Nov. 10th regarding 75 of these Bracket Backs, although we asked you by letter and over the long distance phone to reply to same. We want to know if you will omit 75 Bracket Backs, allowing us now to return you 51 of the ones we have, and give us credit for same. This is your stock piece we understand.

42 Kindly rush the parts to complete the fixtures we have received. It is very disagreeable to run in and out of the occupied apartments in this building so much, and we can't complete anything that you have shipped us so far.

Please send us invoices of your shipments, as it is the shipments are apt to get confused and cause no end of trouble to straighten out.

Yours very truly,

(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR."

"Washington, D. C., Dec. 5th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

We are in receipt of your letter today from Mr. Bates Warren, containing the following paragraph:

"Referring to your telephone conversation with your New York people today (dated Dec. 4th) that they had already made and will in the next 15 days make certain specific shipments of Lighting Fixtures for the two buildings, I would suggest that you write them immediately stating that you have made these statements to me, and that I direct you to say to them that unless their promises on these shipments are lived up to to the very day that I shall cancel my con-

tracts for the fixtures and go out into the open market and buy such suitable fixtures as I can obtain and will charge the cost of same to you, and that you in turn will look to them to reimburse you."

Based on your written promise to the writer while in New York, a copy of which was transmitted to Mr. Warren, they have made rent agreements with tenants whereby they receive no rent until the Apartments are complete, consequently your failure to live up to your promises is costing them a large sum of money, and while they have been exceptionally patient with us, they have reached the limit and unless the present arrangement is carried out to the letter they will make real trouble, and we sincerely hope that you will take this matter seriously, and make your shipments on time.

We are enclosing herewith a copy of the list we promised Mr. Warren based on your telephone promise, which was also written by Mr. Warren and this copy returned with the above letter.

Yours very truly,

(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR."

43

"Washington, D. C., Dec. 11th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

Referring to your favor of December 5th, Mr. Bates Warren is expected to be in the city tomorrow and we will try and get a note for \$1,500 and forward same at once.

We received the bowls from Max Schaffer Co.

On your invoice of November 30th, you have not shipped the glassware for the 41 #w5285 1-Light Electrics; Glassware for the 39 #w204 1-Light Electrics; none of the 13 W5255 6-Light Chandeliers (when were these shipped) and as near as we can tell tonight we are short the candles for the W202 and Ww5255 fixtures billed. Please rush these goods forward as we cannot make any kind of a showing unless we can finish as we go along.

Please make a copy of the list we sent you last week regarding the time of deliveries, and send the original to us. Mr. Warren wants to meet us Wednesday morning on the job and check us, we have no memo. of the list, the original being in Mr. Warren's office.

Yours very truly,

(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR."

“Washington, D. C., Dec. 13th, 1916.

Empire Lighting Fixture Co.,
224 Centre Street,
New York City.

GENTLEMEN:

Mr. Warren left the city last night for several days without signing your note, and notified us that unless we could make a better showing than we have by the time he returns, he will start an action for damages. They are keeping a record of losses to them on account of the delay in installing the fixtures under your contract and we would advise you to make an exceptional effort to get the bulk of the fixtures down here immediately. To facilitate matters we would suggest forwarding same by express from now on, and you pay the difference between the freight and drayage and the express charges.

We further suggest that you express the Dining Room Brackets #W200 and the Large Living Room Brackets W208 and W206 Parlor Brackets this week sure so we can start installing them bright and early Monday morning, and follow this with the balance of the fixtures right away. It will be to your interests to double up your working force on this order now and clean it up. We have a suspicion that Mr. Warren will make arrangements to buy some fixtures while he is away this time, and charge the same back to us at market prices unless we have shown them something interesting by the first of the week. We have about completed the installation of the
44 fixtures we have in hand, but the glassware shortage makes a bad showing.

You have an order for some Chandeliers for “Belmont” job. Please report progress on these fixtures. This job is complete now excepting your fixtures, and the building has been occupied for some time. We must have these fixtures at once.

Yours truly,

(Signed)

J. E. TAYLOR & CO.
N. I. TAYLOR.

P. S.—“Belmont” refers to our order 9/26/16 acknowledged by your letter October 16th.”

Thereupon, the parties having announced the close of the case, the defendant J. E. Taylor & Company offered the following prayers, not as a series, but as separate and distinct prayers:

“1. The jury are instructed to return their verdict for the defendant corporation.

2. The jury are instructed that if they find from all of the evidence that the plaintiff and the defendant corporations, through their presidents, conspired to defraud one Bates Warren by substituting some other substance than brass in the manufacture of the fixtures mentioned in the testimony, their verdict should be for the defendants.

3. The jury are instructed that if they find from all of the evidence in the case that a new agreement was made substantially — to the one of July 14, 1916, by and between the plaintiff, the defendant corporation and one Bates Warren, by which new agreement the fixtures were to be and were sold by the plaintiff to said Warren, who agreed to pay the plaintiff therefor, and that said fixtures were shipped to said Warren by the plaintiff, then the verdict should be for the defendant.

4. The jury are instructed that if they find from all of the evidence in the case that the plaintiff agreed to deliver the fixtures mentioned in the evidence at a certain time or times; that the fixtures were required for use in the construction of a certain building then being erected; that the plaintiff failed to furnish said fixtures within the time or time- within which plaintiff agreed to furnish the same, this failure or failures constituted in law a breach of the plaintiff's agreement; and the jury are further instructed that the defendant corporation is entitled to such damages as it may have sustained, if they further find that it sustained any damage by reason of said failure, and the jury may deduct the amount of such damages so found by them from whatever sum they may find to be owing to the plaintiff, and in the event that the damages sustained by the defendant are found by the jury to be in excess of the amount
45 which the jury finds to be owing to the plaintiff, *and* their verdict should be for the defendant corporation in a sum equal to said excess.

5. The jury are instructed that they are the judges as to the weight and sufficiency of the evidence and of the credibility of the witnesses, and that they may believe a witness in whole or in part or may entirely disregard his testimony if they find that he has knowingly told an untruth in any respect.

6. The jury are instructed that if they find from all of the evidence in the case that the plaintiff refused to manufacture or deliver the fixtures mentioned in the testimony under the written proposal of plaintiff and acceptance of defendant corporation dated July 14, 1916 until and unless the plaintiff became satisfied as to the security for and method of payment for said fixtures, that there was no contract consummated between the plaintiff and defendant corporation so long as the plaintiff continued to refuse to manufacture or deliver said fixtures.

7. The jury are instructed that if they find from all of the evidence in the case that no agreement or contract had been fully consummated between the plaintiff and defendant corporation until October 4, 1916, and if they further find that at that time an agreement was entered into by which the plaintiff required payment to be made for said fixtures by one Bates Warren by promissory note or otherwise and insisted that the said fixtures be shipped and billed to said Warren, and if they further find that such of said fixtures which were shipped were shipped and billed to said Warren, these facts are sufficient to justify a finding by the jury that the fixtures were sold by the plaintiff to said Warren.

8. If the jury finds from all of the evidence in the case that the final arrangement was that the fixtures mentioned in the evidence were sold by the plaintiff to one Bates Warren and were shipped and billed to him, then the verdict should be for the defendants, unless you further find that the defendant corporation also promised to pay for said fixtures.

9. The jury are instructed that their verdict should be for the defendants if they find from all of the evidence in the case that one Bates Warren was substituted as purchaser for the defendant corporation."

The Court, however, refused to grant each and all of said prayers, to which action of the Court the said defendant then and there excepted, and said exceptions were entered upon the minutes of the Court.

46 The defendant, Kernodle, thereupon, through his counsel, asked the Court to instruct the jury in accordance with his five several prayers, as follows:

"1. You are instructed that if you find from the evidence that the guaranty dated July 17, 1916, was delivered to the plaintiff with the understanding that it should become effective in the event the financial standing of the defendant, Kernodle, was found, upon investigation, to be satisfactory to the plaintiff, and further find that the plaintiff, after investigation, was not satisfied with Kernodle's standing and declined to accept him as guarantor, and so notified the principal, J. E. Taylor & Company, then your verdict should be for the defendant, Kernodle.

2. Even if you find that it was understood between the parties that the guaranty signed by Kernodle should become effective upon delivery thereof to the plaintiff, yet if you further find that thereafter the plaintiff and the defendant J. E. Taylor & Company materially modified the terms and conditions of the contract exacting between them without consent of Kernodle, then you are instructed that such modification of the principal contract would have the effect of discharging Kernodle as surety and if you so find, your verdict must be in his favor.

3. You are instructed that a change in the time or manner of payment of the amounts due under the principal contract, would constitute such material change of said contract as to discharge the guarantor, if such change were made without his consent.

4. You are instructed that unless the plaintiff accepted Kernodle as surety there was no contract between Kernodle and the plaintiff and if you find that the plaintiff declined to accept Kernodle as surety and so notified J. E. Taylor and Company then you are instructed that Kernodle is not liable and your verdict should be in his favor.

5. The jurors are instructed that upon the whole evidence their verdict should be for the defendant, Kernodle."

The Court refused to grant any of said prayers so requested by the defendant, Kernodle, to which action of the Court said defendant then and there excepted, and said exceptions were entered upon the minutes of the Court.

Thereupon the Court instructed the jury as follows:

“The Court (Stafford, J.): Gentlemen of the Jury, you may have found the taking of the testimony in this case tedious, but I am sure you have not found the argument by counsel tedious. The case has been well and thoroughly argued, and I have observed
47 that you have followed it with very close attention. It must have been very helpful to you in a case of this character where there is so much in writing which you have not had the opportunity to read as the trial was going on. You have now heard the papers read, and I think you have the case in hand. I have no doubt that when you have gone over the case together, if you do it with the right spirit, you will be able to come to an agreement about it. The law does not say that you shall approach the discussion of a case in any particular way, and I have no right to tell you how you shall do it. That is for your own good judgment. But I am sure you will pardon me for making a suggestion which perhaps I have made to you before, and that is that you take up the discussion of the case and express your opinion about it, in the first place, in a tentative way, rather than in taking a position that you cannot recede from after you have once taken it. Listen to the suggestions of your fellows before you take a final position in the case. Of course, you will express your opinions to each other about this, that and the other thing in the case, but it is much more likely that you will reach and agreement if you do not in the very early stages of the case taken such a positive position about it that you will be ashamed to acknowledge any change in your views afterwards. Wherever men get together they have to act in that spirit, or else there is very little prospect of their ever agreeing.

In this case the plaintiff has brought an action in two phases, first, to recover for the price of goods sold and delivered to the defendant company, alleged to have been guaranteed by Dr. Kernodle; and then, also, to recover damages from the defendant company for not taking and paying for another part of the bill of goods. Of course it stands upon contract, and the first question is whether there was a contract entered into by these two parties and binding upon them. I am speaking now of the principal parties, leaving out Dr. Kernodle for a moment—the two corporations here which, of course, acted through their agents and officers. Did they arrive at a complete contract with respect to this matter so that the plaintiff was to furnish certain goods and the defendant was to take them and pay for them? That is disputed right on the threshold. It is said that there was, of course, a negotiation about a contract and a great deal of correspondence when the contract was drawn up and the guarantee was drawn up, and there were conversations between the parties, but that nothing was really done under it and it was all held in abeyance for a long time; that the plaintiff had not even attempted to go to work upon the contract, much less had shipped any of the goods, and that before the matter was really completed, agreed upon and entered upon, a shift was made and a new party came in as purchaser of the goods—Mr. Warren.

48 That matter has been very thoroughly discussed to you on both sides. The various pieces of testimony bearing upon it have been called to your attention, and the writings, the course of the proceedings and dates of the different transactions, and it is a question of fact for you to determine which party is right about it.

Was this really, after all, a contract between the Lighting Company and the Taylor Company, so that the real contract relation was between them and the goods were furnished by the plaintiff to the defendant with an order upon Mr. Warren which he accepted in the form in which you have seen, but which has never been paid? Was the contract really between the plaintiff and the defendant in this case? Was that order taken as a security, an additional security for the payment of the bill, a security insisted upon by the plaintiff before the goods should be shipped, but leaving the real question of the parties untouched, leaving the contract still a contract between the plaintiff and the defendant? Was that it? If so, there is nothing to the defense upon the subject. Or, on the other hand, was it what the defendant says, what the law would call a novation, a new contract entered into in place of the old? That is, did Mr. Warren come into it as a purchaser and undertake to pay for those goods, and the Taylor Company stepped out as purchaser and was not to be the purchaser, was not to be looked to for payment, was to be released from the old contract?

That proposition implies those two things, first, that Warren did come in and undertake to pay; and, second, that the Lighting Company released the Taylor Company and let them go. Was that the real arrangement? If it was, there can be no recovery, of course, in this case, because the plaintiff would have to sue Bates Warren.

Now, you ought to consider that question very thoroughly, very carefully; go over it among yourselves and discuss it and see what the evidence is pro and con upon that subject. What is the good sense of it and the probability? Consider how the parties conducted themselves with respect to each other and to these different transactions.

The burden, of course, is on the plaintiff to make out that there was a contract between the plaintiff and the defendant. He has not got to prove it beyond a reasonable doubt, but he has to make it out by fair preponderance of the evidence, which means that when you have considered all of the evidence in the case bearing upon that subject, you are more inclined to think it is as the plaintiff says than as the defendant says. Has the plaintiff made it out so that on the whole, when you consider everything, you are more inclined to think that the contract still subsisted, that there was a contract still between the plaintiff and the defendant, than to think there was a substitution of Mr. Warren and the release of the defendant?

If you find in the plaintiff's favor upon that question, that is, that there was no release of the defendant, no substitution of Mr.
49 Warren, then you come to the question what was the real contract between the parties? You have a contract here in writing, a copy of which is attached as an exhibit to the declaration filed

in the case, and of course that is specific; and you have the correspondence here and the testimony as to modifications or changes.

I think there is no testimony distinctly in respect to a change as to the \$1,500 payment, unless you find that Mr. Warren was substituted. Of course, if he was, that ends the case, anyway. But if the contract remained between the plaintiff and the defendant, it seems to have been agreed between them that if the account ran up over \$1,500 there should be payments; the payments after that should be anticipated.

Now, did the plaintiff furnish the goods that are named in the specifications here, and were they accepted and received by the defendants?

Mr. Ansorge has testified that Mr. Taylor acknowledged that he had received all these items which the specification attached to the declaration charges against the defendant as having been shipped to and received by the defendant. Did Mr. Taylor deny that? You will remember what the evidence is upon that subject and what is the evidence as to what was in fact shipped to and received by the defendant company, and what that would come to at the price fixed by the contract.

That is one part of the claim. If these goods were accepted, even if they were overdue—if they were accepted and used by the defendant, I understand that they would be bound to pay for them at the contract price. He might possibly have refused to accept them, but he did not; he accepted them and used them.

It is for you to find as a matter of fact what goods were so shipped and received by the defendant, whether they were accepted by the defendant and used by the defendant and what they amount to at the prices the parties agreed upon. Then, if you find for the plaintiff, of course that would be the amount on that phase of the case.

Now as to the other part, the goods that the plaintiff claims to have manufactured and was ready to deliver but which have never been delivered, the plaintiff's position about that, as you well understand, is that while the goods were finished and ready to be delivered, that the payments were not made in accordance with the contract and that the plaintiff accordingly would not furnish them.

If the payments had not been made in accordance with the contract, of course the plaintiff had the right to keep the goods; and the fact, if it is a fact, that the plaintiff had made them and was ready to furnish them upon payment, would be a compliance with the contract on the plaintiff's part sufficient so that he could maintain his action for damages for the breach, if there was a breach.

But that involves the question of whether he had performed the contract on his part, as to the goods that were not furnished. Was he away behind on that part, and unreasonably behind? Were the goods to have been furnished for a specific purpose and required by a certain time, so that time was of the essence of the contract, so that both parties understood perfectly well that they were to be furnished by a certain time, and was the plaintiff away behind in that time? If so, then his allegation is not true, which is that he was ready on his part to perform the contract, and

he could not recover damages for the defendant's not accepting the goods which he had not been ready, within his contract, to supply.

You see, it is different from a case where the goods were furnished, although they were a little late, and were accepted and used by the defendant. Of course the defendant ought to pay for those.

But when you come to other goods which the plaintiff had manufactured but which the defendant has never taken, never had the benefit of, I say you want to look and see on the evidence whether the plaintiff had performed on his part. If he had not, if he was at fault as to that part of the case, then it would not be just to make the defendant pay for those goods or pay for any damages upon them, because the whole of the plaintiff's case upon that branch of it stands on the theory that he had been ready on his part, and the only reason why they were not furnished was that the defendant had not been coming forward with the payments. If the reason was that the plaintiff had not been ready within the time, why, then, of course the case falls upon that branch of it.

As I understand, the bill, a copy of which is attached here to the declaration, shows the amount claimed by the plaintiff for goods claimed to have been furnished and received and used by the defendant, and also as to these other items manufactured byt not delivered because, as alleged, the defendant had not been keeping up the payments; and if you find that the plaintiff had them ready in time and the fault was on the part of the defendant, and that the plaintiff should have received the amount stated in the contract for them and that the defendant has wrongfully refused to take them and pay for them, then you will find out what they are worth now in the hands of the plaintiff, what the fair market value is, and make the deduction and allow the difference to the plaintiff as damages.

Now, that is treating the case as it probably will have to be treated by you as between the corporations. Of course, Dr. Kernodle is a mere guarantor. If the defendant corporation is not liable, he is not liable. But if you find that the defendant corporation is liable, then you come to the question of whether Dr. Kernodle is liable as guarantor.

This contract of guarantee has been read to you. A copy of it is attached to the declaration. You are allowed to refer to that if you have occasion to. It is an absolute guarantee on the face of it. It says:

"In consideration of one dollar to me in hand paid, and further consideration of my interest in the J. E. Taylor Company's contract with the De Luxe Apartment House, I hereby guarantee payment of all the goods and merchandise ordered by J. E. Taylor & Company for the De Luxe Apartment House according to schedules submitted under this date."

51 That is, they must be goods called for by that schedule.

"For the sum of \$4,756."

That would be the limit, of course, of his liability.

"Should J. E. Taylor & Company fail to make payment according to the terms of the schedule, I will make such payments for the account of J. E. Taylor Company to the Empire Lighting Fixture

Company the same as if I had purchased the merchandise for my own account."

You see, that is an absolute guarantee on the face of it, and indicates that Dr. Kernodle knew what the contract was, the contract in writing here which you have before you as to the schedule, what goods were to be furnished, and the prices, and how the payments were to be made. That is the contract which he undertook to guarantee, not some other contract. But if the parties entered into a different contract about that, he would not be bound, of course. That is the contract that he undertook to guarantee. So that if the contract was changed between them, that would be enough to release Dr. Kernodle. If Mr. Warren was brought in as the purchaser and Taylor & Company released, of course that released Dr. Kernodle, too.

But it is also claimed that the evidence in the case, and especially the letters, shows that this guarantee which is absolute on its face was simply sent to the Lighting Company for them to make up their minds whether they would furnish the goods in reliance upon the defendant company and Dr. Kernodle. If they wanted to do that, they were at liberty to do it; but if they decided not to do it, why then, it would not be treated as having been accepted as a guarantee. You have heard that question thoroughly discussed. Are you satisfied from the correspondence and all of the testimony bearing upon that point that that was the case, that it was merely tendered to the company; that is, that they took the matter up and decided whether they would furnish the goods in reliance upon the defendant company and Dr. Kernodle's guarantee? If so, then the question is whether that condition was fulfilled. If there was not any condition about it, why, of course, Dr. Kernodle is bound. If it was passed over to the plaintiff company and received by them unconditionally, then he is bound by the terms of his guarantee; and if it was passed over to the company, upon this condition, then was the condition fulfilled, or was it rejected? Was the guarantee rejected? When the goods were furnished, or when, finally, the plaintiff company went to work, laid out its money to get ready on this contract, had it rejected this guarantee and relied upon something else? Had it determined not to furnish the goods upon the credit of the defendant company and Dr. Kernodle, and rejected this guarantee as insufficient, or had it accepted it as far as it would go and insisted upon something further—an order from Mr. Warren, or whatever it might be?

That is a question of fact on all the evidence for you to determine, and to determine with great care to be sure that you do justice to both sides of the case and to all parties interested.

52 You have a right to take into consideration the human probabilities, what was done with the paper and what was done with reference to furnishing the goods and what was done with reference to Mr. Warren in taking the order from him, the conversations between the parties in New York and every other bit of evidence which will come to your mind, whether I refer to it or not. Take all the evidence bearing upon the question into consideration and make up your minds, in the first place, whether the paper was handed to

the plaintiff company conditionally or not, and if it was handed to them conditionally, whether they did reject it and turn to something else and rely upon that, so that they did not rely upon the credit of Dr. Kernodle in furnishing the goods or doing the work. If they did not, of course they ought not to hold him now. If they did, even though they took other security in addition to him, Dr. Kernodle would be liable, notwithstanding they did take other precautions and take other security. They would have a right to do that.

Now, as to the witnesses, of course you are the sole judges of the witnesses as to how far you will give them credit, what you think of them and their reliability and candor, their honesty, everything about them as witnesses.

• If you find that any witness has testified falsely and done it knowingly as to any material matter, the law is that the jury have the right to reject his whole testimony, although they are not bound to do so. And if that applies to any witness in this case, you have a right to apply that rule.

I am asked to give you the law upon that subject, and I do, without any intimation as to whether I think any witness has testified falsely or not. That is entirely a question for you, and I do not wish to intimate that I think so or do not think so.

Now, gentlemen, unless there is something else that you want me to speak of particularly——

Mr. White: If your Honor please, there are just two things in your Honor's charge in relation to the novation which of course presumes a contract complete with the defendant corporation, first, and a substitution of another contract. It seems to me there is left out of consideration that the contract never was complete until May, after the introduction of Mr. Warren. If your Honor will add to the charge in that regard——

The Court: I accept what Mr. White has just said in your hearing. That is certainly true. The defendant means that the contract never was completed, so that there was no occasion for substituting anyone else for the defendant company. That is a matter for you to consider.

Mr. White: Just one other thing, very like that, and that is, in the words used by your Honor, as to the shipping of goods to the defendant corporation and the receipt of the goods by the defendant corporation there is not included the hypothesis which the defendant contends is a proper one, namely, that they may have been
53 handling these goods for Mr. Warren. That is, there is evidence and written evidence by the plaintiff in his billing that the goods were sold to Mr. Warren, and the bills of lading show they were shipped to Mr. Warren care J. E. Taylor Company, the theory being, your Honor, that in taking these goods and in doing this work upon them they were receiving the goods for Mr. Warren.

The Court: Of course, if they were receiving them for Mr. Warren merely as his agent—that is not what I mean by accepting and receiving and using the goods. I am speaking of their receiving them

as the parties to the contract, of course. I think the jury will understand that.

Be it remembered that each of the several and separate exceptions taken by counsel for the defendants as hereinbefore set forth was so taken by said counsel then and there before the jury retired and each of said exceptions was then and there separately and severally entered upon the minutes of the justice presiding at the trial and counsel for the defendants then and there prayed the Court, and now prays the Court, to sign and seal this bill of exceptions in which is accurately set forth said exceptions and the substance of all the evidence given at the trial, and at the request of said counsel the same is accordingly signed and sealed and made a part of the record this 14th day of June, A. D. 1920.

WENDELL B. STAFFORD,
Justice.

O. K.
B. E. HINTON.

54 [Endorsed:] Supreme Court, D. C. Law. No. 60437.
Empire Lighting & Fixture Co., a Corporation, Plaintiff, vs.
J. E. Taylor & Company, a Corporation, and G. W. Kernodle, Defendants. Bill of Exceptions. Law offices of Leckie, Cox & Sherier, 817 Southern Building, Washington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No. 3425. J. E. Taylor & Company, a Corp., et al., appellants, vs. Empire Lighting Fixture Co., Inc., a Corporation. Court of Appeals, District of Columbia. Filed Jul- 15, 1920. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 7 - 1920

IN THE

Henry W. Hodges.
clerk

Court of Appeals of the District of Columbia

OCTOBER TERM, 1920.

No. 3425

J. E. TAYLOR & COMPANY, A CORPORATION,
AND GEORGE W. KERNODLE, APPELLANTS,

vs.

EMPIRE LIGHTING FIXTURE CO., INC., A
CORPORATION.

**BRIEF FOR APPELLANT, J. E. TAYLOR
& COMPANY.**

WILLIAM HENRY WHITE,

Attorney for J. E. Taylor & Co., Appellant.

IN THE
Court of Appeals of the District of Columbia
OCTOBER TERM, 1920.

No. 3425

J. E. TAYLOR & COMPANY, A CORPORATION,
AND GEORGE W. KERNODLE, APPELLANTS,

vs.

EMPIRE LIGHTING FIXTURE CO., INC., A
CORPORATION.

**BRIEF FOR APPELLANT, J. E. TAYLOR
& COMPANY.**

STATEMENT OF FACTS.

This appeal is from the judgment upon a verdict of a jury. The facts are recited under the

ASSIGNMENTS OF ERROR.

Error is assigned for refusal to grant this defendant's prayers Nos. 1 to 9. We ask their consideration under these heads:

**VERDICT FOR DEFENDANT SHOULD HAVE
BEEN DIRECTED.**

This was asked by prayer No. 1.

The suit is upon the one special count. There are no common or other counts. Plaintiff's sole claim is this (Rec. 2):

“that heretofore, to wit, on the 17th day of July, 1916, the plaintiff and the defendant, J. E. Taylor & Company entered into a contract in writing, consisting of a proposal dated July 14, 1916, addressed by the plaintiff to the defendant J. E. Taylor & Company, and accepted at the bottom thereof in writing by the said defendant J. E. Taylor Company, and delivered to the plaintiff on to wit the 17th day of July, 1916, which said proposal and acceptance, constituting said contract, is attached hereto and marked plaintiff's Exhibit A, by the terms whereof it was agreed that the plaintiff would furnish to said defendant J. E. Taylor & Co. f. o. b. New York, the lighting fixtures enumerated in said contract, and that the said defendant would pay therefor the net sum of Forty-seven Hundred and Fifty-Six Dollars (\$4,756), on the terms that the fixtures should be paid for thirty days from date of shipment, or in cash in advance of shipment if the account should run beyond Fifteen Hundred Dollars (\$1,500) * * * and the plaintiff * * * manufactured all of the fixtures enumerated in its said contract * * * and delivered to the said defendant J. E. Taylor & Company such fixtures until the account exceeded the sum of fifteen hundred dollars (\$1,500), as * * * shown by * * * exhibit C * * * tendered the remainder * * * yet the said defendants, nor either of them have paid to the plaintiff the said * * * \$4,756 * * * or any part thereof * * * and by reason thereof the plaintiff has been damaged, and has lost the sum of * * * \$4,756 with interest * * *.

Wherefore it claims that sum, interest and costs.

FIRST POINT.

This being a suit solely upon the contract pleaded, our first point is that the contract was never entered

into between plaintiff and this defendant, though one may have been between plaintiff and Mr. Bates Warren. In other words, the fixtures were neither sold, shipped nor delivered to this defendant. The undisputed facts in evidence are these:

Defendant had a contract with Mr. Warren to furnish and install *brass* lighting fixtures in an apartment house at 2029 Connecticut Avenue, N. W., in Washington, known as the "De Lux" (R., 7, 8, 24). Plaintiff, in writing, proposed July 14, 1916, to furnish certain enumerated fixtures for such use, material not being mentioned and prices not being given except the lump sum of \$4,756 for the total, f. o. b. New York (R., 5, 18). Plaintiff knew they were for the apartment house being "constucted by Warren" (R., 20). While this proposal was dated July 14, it was sent by plaintiff with a letter of July 12, apparently, which said:

"Please give this order your prompt attention and mail us an acceptance in which you will make some satisfactory arrangement as to payments."
(R., 21.)

Various unsuccessful efforts were made during July, August and September to reach an agreement (R., 21, 22, 23). September 8, defendant wrote that it had up the matter of an order with Mr. Warren but he would not make payments on fixtures until they were installed in his building. Plaintiff answered on September 13:

"we obtained information about Mr. Bates Warren, and will be willing to accept his order, but we do not know how we can arrange payments to only be made after fixtures are installed in the building. We would expect payment upon delivery * * *. If you will get this contract in such shape that we

are guaranteed with our payments, and get Mr. Warren to accept fixtures similar but not identical with the sketches submitted, we will proceed with the order with all possible speed, but until we hear definitely from you we cannot make any promises.” (R., 23.)

Plaintiff did no work on these fixtures pending these negotiations (R., 23). If an agreement was ever reached, it was not until October 4 (R., 24). The writings then took the form of an order drawn by defendant upon Mr. Warren dated October 2. Acceptance by Mr. Warren dated October 3, was upon four conditions or new elements, namely:

1. Payment for fixtures delivered at the building, instead of f. o. b. New York.
2. Payment “upon the condition that fixtures delivered are in accordance with” his contract with defendant, that is, brass fixtures. Writing of July 14, sued on is silent as to material.
3. Payment by Mr. Warren to plaintiff directly.
4. Payment in promissory notes signed by Mr. Warren, payable “to the order of the Empire Lighting Fixture Co., payable thirty days after date and to bear interest.”

The above was accepted by plaintiff on October 4, except as to conditions of the Taylor-Warren contract which it said were not “familiar to” it; but it did know brass was required (See Browning testimony, and no denial by Answorge except as to “terms” only, of the contract and letter of plaintiff of October 28; R., 27 and 28).

The first shipment was not made until November 4. The last one was made December 16 (R., 20). All deliveries that were made were by shipment to “Bates

Warren'' (R., 21) and were ''delivered to the De Luxe Apartment, Washington, D. C.'' by plaintiff (R., 8). A large part were never shipped, and no reason is assigned therefor (R., 21) though it is shown that Mr. Warren first refused to pay for them because of plaintiff's delays in delivery (R., 30, 31, 32) and later because he discovered the fixtures were not made of brass (R., 27). These delays were also found by the jury else no reason can be assigned for verdict of less than \$4,756. (Court's Charge, R., 37.)

The record discloses this strange condition as to deliveries:

''The deliveries were started November 4 and were made every few days until December 16, 1916'' (R., 20).

The remainder of the fixtures were ready for shipment December 5, 1916, but were never shipped (R., 21). Those shipped were billed to ''Bates Warren, care J. E. Taylor & Co.'' (R., 21.) They were ''delivered to the De Luxe Apartment, Washington, D. C.'' (R., 8); but the date is not given for any delivery. No reason is given for failure to deliver the balance which were ready eleven days before the last shipment was made (R., 21).

Defendant was called into court to defend a suit upon a written contract with it on and dated July 14, 1916, for fixtures to be delivered to it f. o. b. New York, for which it personally agreed in the contract to pay in cash to the plaintiff. It was confronted at the trial with a contract made, if ever, on October 4, 1916, with Mr. Warren; for fixtures to be delivered at his building in Washington; for which he, in another writing, agreed to pay personally to the plaintiff in his own commercial

paper to plaintiff and upon which defendant's name did not even appear. As to performance defendant is met with proof of delivery of part of the fixtures only without any reason for failure to deliver the balance; with proof of shipment to Bates Warren and delivery to his apartment house of the only fixtures ever delivered; with the writing of July 14, which is silent as to the material of which the fixtures are to be made; and with proof of knowledge of plaintiff that the fixtures were to be brass (R., 28) and were of another metal; and of delays in delivery resulting in such injury to Mr. Warren that he refused to pay for them for these reasons although he had been "exceptionally patient" and had given timely warning and notice of the injuries sustained and to be sustained by him (R., 29, 30).

SECOND POINT.

Even if there were evidence to go to the jury upon delivery, modified agreement, etc., there is no proof to sustain a verdict for any sum.

With whomsoever the contract may have been entered into, it is entire—for so many and such fixtures for \$4,756. There is no contract for any part of them at any certain price. There is no unit contract price for any fixture or number less than all of them. The only testimony on the subject is found on pages 20 and 21 of the record. There Mr. Ansorge identified a bill of November 30 to Bates Warren, care of J. E. Taylor & Co. for bedroom, foyer, living room and hall fixtures, giving unit prices and a total; also this bill and another of December 16,

“covering fixtures delivered to the truck line for shipment to Bates Warren care of J. E. Taylor & Co.”

was offered in evidence and the bills amounted to \$3,202.30. The witness said that N. I. Taylor said they were all received, but not by whom; that the fixtures not shipped were parlor, living room, ladies' room, vestibule, corridor and foyer fixtures and switches and he gave the unit prices which amounted to \$1,541.75, and that

“these values were in accordance with estimates furnished defendant corporation prior to execution of contract of July 14, 1916. Witness was then asked what part of sum of \$4,756.00 mentioned in contract is represented by goods still in possession of plaintiff to which question the defendants objected, but the court overruled the objection, to which action of the court the defendant excepted and said exception was then and there entered on the minutes of the trial justice. The witness thereupon testified that fixtures representing \$1,541.00 of the contract price due to the Taylor Company under the contract of July 14, 1916, were still in the hands of the plaintiff. The witness was then asked whether the fixtures in question were of standard or special make, to which question the defendant objected on the ground that it was immaterial, but the court overruled the objection and allowed the witness to answer, to which action of the court the defendants excepted and said exception was then and there entered on the minutes of the court. The witness then answered that the fixtures were specially made. The market value of the fixtures on hand about the middle of December, 1916, was \$470.00. No payments have been made on account of the fixtures in question, although demands had been made upon the J. E. Taylor Co.” (R., 21).

By the “estimates furnished” the witness means “Exhibit A” sent July 12 (R., 21) and no unit prices

are in it. He does not say the estimates furnished contained the unit prices or "values." What plaintiff may have had in mind by the way of unit prices or "values" in making the total of \$4,756, cannot bind the defendant to pay those prices for any one or any number.

"All previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement." *Kinney v. McNabb*, 44 App. D. C., 343.

The fixtures furnished are "estimated" by plaintiff at unit prices of \$3, \$4.00, \$8.00, \$5.20, \$3.50 and \$12.50 each (R., 20). The "estimated" unit prices for those not furnished are \$15.50, \$100.00, \$25.00, \$4.00, \$80.00, \$52.00 and \$30.00. The injustice of this is apparent even if the estimated unit prices had been furnished previously. One might be willing to pay \$4,756 for all of the fixtures including the fifty, eighty and one hundred dollar ones, but not willing to buy the cheaper ones alone at the estimated prices. He might be willing to pay the total for all because they completed his contract with Mr. Warren, but not part at any such prices because of difficulty of procuring the others separately, at proper prices, or at all. The contract contains no unit price.

There is no proof of market or other values and there are no common counts under which such proof might have been considered. The only proof of market value was \$470.00 for those not delivered. Notwithstanding the above, the court in his charge said:

"That is one part of the claim. If these goods were accepted, even if they were overdue—if they

were accepted and used by the defendant, I understand that they would be bound to pay for them at the contract price. He might possibly have refused to accept them, but he did not; he accepted them and used them.

“It is for you to find as a matter of fact what goods were so shipped and received by the defendant, whether they were accepted by the defendant and used by the defendant and what they amount to at the prices the parties agreed upon. Then, if you find for the plaintiff, of course that would be the amount on that phase of the case.”

NOVATION.

Prayers, 3, 6, 7, 8 and 9 are all efforts to have the jury pass upon the question as to whether there was a contract between plaintiff and defendant or whether the contract was between plaintiff and Mr. Warren, if any contract was ever made. The court refused all prayers, assuming thereby the responsibility of instructing the jury upon all phases of the case and confused the above question with Novation (R., 36). The only hypothesis left to the jury justifying a finding for defendant was, first, a contract with it, next a new contract with Warren, and, last, a release of defendant under its contract; in other words, a novation, only. Even when counsel undertook to clear it up, he was interrupted. This is the record:

“If your honor will add to the charge in that regard—

“The Court: I accept what Mr. White has just said in your hearing. That is certainly true. The defendant means that the contract never was completed, so that there was no occasion for substi-

tuting anyone else for the defendant company. That is a matter for you to consider.” (R., 40.)

But when the jury had considered it and found, as upon the record they must, that there was never a complete contract with defendant, what were they to do? The prayers told them. The court did not, except that defendant ought to pay for the fixtures delivered.

The same is true of the next request. The jury were not told what to do nor the legal effect if defendant received the goods for Mr. Warren; only what the court meant by receiving and using the goods. I do not think the jury did “understand that” coming as it did after this:

“If these goods were accepted, even if they were overdue—if they were accepted and used by the defendant, I understand that they would be bound to pay for them at the contract price. He might possibly have refused to accept them, but he did not; *he accepted them and used them.*” (R., 37).

Referring to the goods not shipped, the court said (R., 38):

“You see it is different from a case where the goods were furnished, although they were a little late, and were accepted and used by the defendant. *Of course the defendant ought to pay for those.*”

It is respectfully submitted that the case should be reversed.

WILLIAM HENRY WHITE,
Attorney for J. E. Taylor & Co., Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 6 - 1920

Henry W. Hodges.
clerk

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1920.

No. ~~2435~~ 3425

**J. E. TAYLOR & COMPANY, A CORPORATION,
AND GEORGE W. KERNODLE, APPELLANTS,**

vs.

**EMPIRE LIGHTING FIXTURE COMPANY, INC.,
APPELLEES.**

**BRIEF FOR APPELLANT, GEORGE W.
KERNODLE.**

JOSEPH W. COX,

JOSEPH T. SHERIER,

Attorneys for Appellant, George W. Kernodle.

IN THE
Court of Appeals of the District of Columbia
OCTOBER TERM, 1920.

No. ~~2435~~ 3425

J. E. TAYLOR & COMPANY, A CORPORATION,
AND GEORGE W. KERNODLE, APPELLANTS,

vs.

EMPIRE LIGHTING FIXTURE COMPANY, INC.,
APPELLEES.

**BRIEF FOR APPELLANT, GEORGE W.
KERNODLE.**

STATEMENT OF CASE.

This appeal on behalf of the appellant, George W. Kernodle (one of the defendants below), is from a judgment of the Supreme Court of the District of Columbia, entered upon the verdict of a jury in favor of the appellee (plaintiff below) in an action upon an alleged contract of guaranty.

The plaintiff in its declaration alleged a contract with the defendant, J. E. Taylor & Co., consisting of a proposal to furnish certain specified lighting fixtures for the sum of \$4,756.00, and the acceptance of said offer; and further, a contract of guaranty with the defendant, George W. Kernodle, by the terms whereof

Kernodle agreed with the plaintiff that should the defendant Taylor & Co. fail to pay for the lighting fixtures according to the terms of the offer and acceptance, that Kernodle would make such payments for the account of Taylor & Co. the same as if he had purchased the merchandise for his own account. Plaintiff further alleged the performance on its part of the contract with Taylor & Co., and the failure of the defendants, or either of them, to pay for the lighting fixtures or any part thereof. (R., p. 1-7.)

The defendant, Kernodle, on the trial admitted that at the request of Taylor & Co. he executed the letter of guaranty to be offered to the plaintiff. He contended, however, that the plaintiff declined and refused to accept said guaranty and did not deliver the lighting fixtures in reliance thereupon, but delivered them under a separate and subsequent arrangement whereby one Bates Warren, the owner of the building known as De Lux Apartments, in which the fixtures were intended to be used, undertook to pay for the fixtures upon their delivery at the building.

ASSIGNMENTS OF ERROR.

At the close of the evidence Kernodle submitted five requests for instructions, all of which were refused over his exceptions. (R., p. 34.) The action of the court in refusing these requests is assigned (R., p. 15) and here relied upon as error. The first four, however, it is thought, do not require separate discussion and may be dealt with sufficiently in discussing the court's refusal to grant plaintiff's fifth instruction, viz: "The jurors are instructed that upon the whole evidence their verdict should be for the defendant Kernodle."

ARGUMENT.

It is, of course, fundamental that there can be no contract of guaranty any more than there can be a contract of any other kind without a meeting of the minds. To establish such contract, it is not enough to show that an alleged guarantor may have been willing to enter into it; it is not enough to show that he merely executed an instrument in writing, which, on its face, is an absolute and unconditional guaranty; but it is indispensable to show an acceptance of the guaranty.

The undisputed facts with reference to the alleged guaranty are as follows:

Kernodle was requested by Taylor & Co. and not by the plaintiff to guarantee payment for the fixtures. The first schedule of fixtures was submitted by the plaintiff to Taylor & Co. on July 12, 1916. The plaintiff being unwilling to sell the fixtures on the credit of Taylor & Co., in the letter transmitting the schedule requested Taylor & Co. to "mail us an acceptance in which you will make some satisfactory arrangement as to payments." On the following day, July 13, 1916, Taylor & Co. obtained from Kernodle a letter, absolute on its face, guaranteeing payment of all bills "for fixtures delivered and approved according to the terms agreed upon," and mailed the same to the plaintiff as an offer of the "satisfactory arrangement" required. (R., p. 21.) Attached to this letter of guaranty were the names of several persons given as references regarding Kernodle's financial condition. It clearly appears that the acceptance of Kernodle as guarantor was dependent upon the result of investigation as to his financial standing—he "was to be investigated and if found satisfactory financially, he would be accepted." (Tes-

timony of Taylor, R., p. 25.) Pending the investigation as to Kernodle, the plaintiff forwarded a corrected schedule of fixtures dated July 14, 1916, asking that it be signed and returned promptly, and saying, "in reference to the guarantee and terms of payment, the suggestion made by you is not entirely satisfactory. We must have assurance from you that payment will be made by check promptly within thirty days from the date of shipment." * * * "The guaranty is not in good form, and we would request that you have Dr. G. W. Kernodle sign the inclosed form and return to us promptly." This corrected schedule of fixtures was accepted by Taylor & Co. and the changed form of guaranty was signed by Kernodle, on the 17th day of July, 1916, and both returned to the plaintiff. The investigation as to Kernodle apparently having been completed, the plaintiff wrote Taylor & Co. on August 7th: "The information we are able to obtain about Dr. Kernodle's financial condition is not definite enough to warrant us in extending this large amount of credit." And on the 9th instant, the plaintiff wrote further that: "Dr. Kernodle has no rating and is not established in business, which is the only reason *we cannot accept him as guarantor on a large order.*" * * *

Not only is it thus made clear that Kernodle was not requested by the plaintiff, but by Taylor & Co. to become guarantor; but *it is equally clear that no notice was given to Kernodle of his being accepted as guarantor*, and that on the contrary *Taylor & Co. was expressly notified by the plaintiff that "we cannot accept him as guarantor."*

The undisputed evidence further shows that *after Kernodle signed the letter of July 17, 1916, the terms of the agreement between the plaintiff and Taylor &*

Co., as set out in the corrected schedule of fixtures, dated July 14, 1916, *were materially changed*. By the terms of that schedule payments were to be made "within thirty days from the date of shipment" and "to be anticipated if account runs beyond \$1,500.00." In the letter of August 7, 1916, written after the investigation of Kernodle, and which advised that the information obtained about him was not definite enough to warrant credit, a change in the terms was proposed by the plaintiff, viz: "We ask that you make this transaction a cash proposition, the same as you are buying your electrical supplies, and * * * we request you to please send us a two months' note indorsed by Dr. Kernodle for \$500.00, and also send us your acceptance of a change in the terms, wherein you agree to pay sight draft, bill of lading, for fixtures." (R., p. 22.) This proposed change in terms was apparently not acceptable to Taylor & Co. and certainly was not assented to by Kernodle. (R., p. 25.) However, a new and distinct arrangement was then made by which the fixtures were to be consigned to Bates Warren, the owner of the building in which they were to be used, and under which arrangement Warren was to pay for the fixtures upon the delivery thereof at the building. The nature of the new arrangement appears from the following: On August 29th, the plaintiff wrote Taylor & Co. that "progress on the contract has been delayed because satisfactory arrangements had not been made as to payment," and proposed "*if Mr. Bates Warren will accept an order upon him for the full amount of our contract, payments to be made upon each delivery, we will accept this arrangement, provided we can get some satisfactory information regarding his financial standing* * * *. Please get this matter adjusted at your

earliest convenience so that we may proceed with your order." On September 8, 1916, Taylor & Co. wrote the plaintiff that Warren "will accept an order for the full amount of your contract. * * * We wrote you last week to get a line on Mr. Warren so that you would be in a position to settle this matter definitely at once, and we now ask you to give us immediate reply to this letter." On September 13th plaintiff replied, saying, "we obtained information about Mr. Bates Warren, and will be willing to accept his order * * * *we would expect payment upon delivery* * * *. If you will get this contract in such shape that we are guaranteed our payments, and get Mr. Warren to accept fixtures similar to but not identical with the sketches submitted, we will proceed with the order with all possible speed." Again, on September 30, 1916, plaintiff wrote Taylor & Co., "we are awaiting the acceptance of our conditions as stated fully in our letter of September 13th." On October 2nd, Taylor & Co. drew an order on Warren directing him to pay \$5,000.00 to the plaintiff, to be charged to the contract for lighting fixtures for Warren's building. On October 3, 1916, Warren endorsed upon the order his acceptance, *agreeing to pay the same upon delivery of the fixtures at the building*, payments to be based upon invoices covering shipments and to be made in his promissory notes to the order of the plaintiff, payable thirty days after date. (R., p. 24.) Thereupon, beginning November 4th and continuing to December 16th the deliveries were made, and shipping bills covering the deliveries show that the fixtures were shipped to "Bates Warren in care of J. E. Taylor & Co." (R., p. 20.) Throughout all this correspondence relating to changes in the original proposition, there is not the slightest reference to Kernodle as guarantor;

the uncontradicted testimony is (R., p. 25) that he would not accept the change proposed in the letter of August 7, 1917, and did not consent to any changes (Kernodle, R., p. 25, and Taylor, R., p. 26) and there is not the slightest suggestion in the letters written by the plaintiff to show that he was requested to consent to the final arrangement, or that the plaintiff in any respect whatever relied upon his guaranty in finally making the deliveries. Is it conceivable that, if Kernodle had been accepted as guarantor and the plaintiff expected his guaranty to apply to the arrangement as modified, no reference would have been made to his guaranty in the correspondence by which the changes in terms were effected, and no request would have been made to Kernodle to assent to such changes? The letter of July 17, 1916, signed by Kernodle, purported to "guarantee the payment of all goods and merchandise ordered from you by the J. E. Taylor Co. *according to schedules submitted under this date.*" The terms specified in those schedules were changed without a word being said to Kernodle. But it was not *until after Warren declined to make payments* on goods delivered that a suggestion can be found that Kernodle was considered an acceptable guarantor. (See letters of February 17th and February 20th, 1917, calling on Kernodle to make good under his alleged guaranty. R., p. 25.) It will be noted that in the letter of February 20th, plaintiff states "All correspondence regarding the guarantee and terms of payment on the J. E. Taylor & Co. contract ask for additional security, and the fact that Mr. Bates Warren agreed to make payments to us direct did not in any way relieve you of your responsibility to us," but reference to that correspondence shows clearly that this is a statement of an afterthought, irreconcilable with the correspondence itself. The correspondence will be

searched in vain for a single intimation that the agreement with Warren was in the nature of an additional guaranty. On the contrary, while insisting on changes in the terms of the contract which Kernodle had offered to guarantee plaintiff expressly stated in the correspondence, "We cannot accept him (Kernodle) as guarantor on a large order." Moreover, the uncontradicted testimony of Taylor (R., p. 26) shows that as late as October 4, 1916, the plaintiff, through its president, definitely rejected Kernodle as guarantor.

Upon these undisputed facts it is respectfully submitted that it cannot reasonably be held that there was any acceptance by the plaintiff of Kernodle as guarantor.

The correctness of this conclusion is amply supported by the decisions of the courts, applying under similar circumstances, the principles involved in this case.

In *Henderson v. Reilly*, 1 *MacArthur*, 25, a letter was sent by residents of Georgetown to a firm in Baltimore whereby the writers agreed to be bound to the extent of \$1,200.00 for future credit to be extended to one Mahoney. No notice of acceptance of guaranty was given by beneficiary, who later extended credit to Mahoney on faith of the letter. The court charged the jury that in order to recover it must be proved that notice of acceptance and intention to act on the guaranty was seasonably given guarantors. There being no evidence on this point the jury was directed to find for the defendants.

The court on appeal said: "The authorities on the brief of the appellees sustain most fully the charge of the court to the jury in this case. When a guaranty is prospective and looks only to future transactions, in order to invest it with the obligation of a contract, the party to whom it is addressed must give notice of his

intention to act upon it. The guarantor has the right to know whether it is accepted, in order that he may make such arrangements as will secure himself for his responsibilities."

In *Davis Sewing Machine Co. v. Richards*, 115, U. S., 524, Richards and another executed (and delivered to the agent of the Sewing Machine Co.) a writing in the following form:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Co. for property sold to said John W. Poler, under this contract, to the amount of \$3,000."

Comparison of this writing, in form essentially similar to that signed by Kernodle, shows they are essentially alike in terms. Richards' guaranty was upon the same paper with the principal contract. As the accepted schedule with the writing signed by Kernodle was sent to the plaintiff, so the writing signed by Richards and Rothwell with the principal contract to which it was attached, was delivered to the Sewing Machine Company. The Sewing Machine Company thereafter performed the principal contract, but failed to notify the guarantors of its acceptance of the guaranty. The principal debtor failed to meet his obligations to the Sewing Machine Company and suit was instituted by it against the guarantors. It was contended at the trial in that case, as in this case, that the guaranty was an

absolute one, which required no acceptance or notice of acceptance from the guarantee. The trial court, however, instructed the jury in effect that the paper was merely a proposal, which required an acceptance by the guarantee in order to constitute a contract. There was a verdict for the defendant and a judgment rendered thereon which was affirmed by the Supreme Court of the District of Columbia in general term, from which it went to the Supreme Court of the United States, which disposed of the appellants' contention in the following language, which is thought to apply with controlling force in this case:

“* * * if the guaranty is signed by the guarantor *without any previous request of the other party, and in his absence*, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.”

“The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words ‘value received,’ without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. * * *

“The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.”

Not only is there no evidence in the case at bar, as in the Richards case, that the guaranty was given at the request of the plaintiff, but it is clearly and affirmatively shown that the instrument was executed at the request of Taylor & Co. Like Richards, Kernodle signed in the absence of the plaintiff, and, as in that case, it does not appear either from the instrument or the testimony that any consideration passed from the plaintiff to Kernodle. On the contrary, the circumstances, as well as the language, "In consideration of \$1.00 to me in hand paid, and *further* consideration of my interest in the J. E. Taylor & Co.'s contract with the De Lux Apartment House" is not only consistent with the consideration being received from the principal debtor, but indicates clearly that the consideration like the request to Kernodle came from Taylor & Co. alone and not from the plaintiff.

So in *Barnes Cycle Co. v. Reed*, 84 Fed., 603, the court directed a verdict for the defendant on the ground that a writing similar in form to that signed by Kernodle and delivered under similar circumstances, was a mere proposal needing an acceptance to complete the contract. There the receipt of \$1.00 was also acknowledged by the guarantor, but it did not appear from the paper by whom that amount was paid. The principal contract unmodified, and, not as in this case subsequently changed, was accepted and credit extended to the principal debtor, but no notice was given the guarantor of the acceptance of his guaranty. The Court (p. 605) said:

"Under the circumstances, we are of opinion that the undertaking of Reed was provisional and not absolute. The Barnes Co. was not bound to accept, or, indeed, to enter into a contract with

Schlaudecker. If it saw fit to contract with Schlaudecker, and accept Reed's offer, we are of opinion it was bound to notify Reed of that fact, and of its acceptance of his offer." (p. .)

And in the case of *Hoffman v. Mayaud*, 93 *Fed.*, 171, Joseph C. Hoffman and Bernard Hoffman, members of the firm of Hoffman Brothers Co. of Milwaukee, Wisconsin, addressed to Messrs. Mayaud, Freres, Paris, France, the following letter:

"In consideration of your extending credit to Hoffman Brothers Co., we hereby personally guarantee the payment of all bills contracted by Hoffman Brothers Co."

Relying upon this guaranty, additional time was given for the payment of bills for goods therefore and thereafter delivered to said Company, but no notice was given by the guarantee of the acceptance of the guaranty.

The Court in its opinion (p. 178) said:

"The proper course for the guarantees would have been to write to the guarantors individually, informing them whether the guaranty had been or would be accepted and acted upon. But the guarantors are shown to have been in charge of the business of the corporation, and to have conducted or known of the correspondence, and if, in the letter addressed to the corporation, it had been stated that the guaranty had been received and accepted, it would, of course, have been equivalent to a like statement to the guarantors directly. The plaintiffs not only did not accept the guaranty, or approve the arrangement made and reported by Beck; they insisted upon a remittance of 20,000 francs in addition to the 1,000 francs promised in

the letter of January 10 to be sent monthly, and declared themselves under a necessity 'neither to increase or maintain' the uncovered balance of the account."

An acceptance of the guaranty not having been shown the Court accordingly ruled there could be no recovery thereon.

In the case at bar, as in the Hoffman case, not only did the plaintiff fail to show acceptance of the guaranty, but by undisputed declarations of the plaintiff made both in letters and orally to Taylor & Co. it affirmatively appears that the guaranty was declined.

A collation of the leading authorities upon the questions involved in this case may be found in *12 R. C. L.*, pp. 1067-1069, where the rules are summarized as follows:

"On the other hand, a guaranty signed by the guarantor without any previous request of the beneficiary, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, is in effect a mere offer or overture of guaranty." * * *

"An offer or proposal of guaranty does not become binding on the guarantor until it is accepted by the person to whom it runs. Until the offer is accepted, there is not that meeting of the minds which is essential to all contracts. So, before acceptance, the offer may be withdrawn by the proposed guarantor, and a subsequent acceptance will have no force." * * *

"It is frequently declared that no notice of the acceptance of an absolute guaranty is necessary. But an offer of guaranty requires an acceptance, and such acceptance must be communicated to the guarantor. Where the alleged guaranty is one which is continuing in its nature and covers future

credit to be extended to the principal debtor, it is generally construed as an offer of guaranty rather than an actual guaranty, and it is essential that notice of its acceptance be seasonably given." * * *

It is true that the Court charged the jury that if the contract embodied in the schedules and acceptance thereof was changed, that was enough to release Kernodle, and he also left it to the jury to say whether the writing signed by Kernodle was passed over to the plaintiff and received by it unconditionally. But it was obvious and undisputed that the terms of the contract had been changed and there was not the slightest evidence that Kernodle had assented to the changes. Likewise, there was no suggestion that Kernodle was notified that he was acceptable as guarantor and the letters and oral statements of the plaintiff to Taylor & Co. indisputably show that he was unacceptable and unaccepted. It is, therefore, respectfully submitted that the Court below erred in refusing to direct a verdict for the defendant Kernodle, and that its judgment should be reversed.

JOSEPH W. COX,

JOSEPH T. SHERIER,

Attorneys for Appellant, George W. Kernodle.

COURT OF APPEALS

DISTRICT OF COLUMBIA

FILED

IN THE

NOV 3 - 1920

Henry W. Hodges
Court of Appeals *clerk*

OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1920

No. ~~2485~~ 3425,

J. E. TAYLOR & COMPANY,
A Corporation, and
GEORGE W. KERNODLE,

Appellants,

vs.

EMPIRE LIGHTING FIXTURE
COMPANY, INC.,

Appellee.

BRIEF ON BEHALF OF APPELLEE

BYNUM E. HINTON,
J. H. BILBREY,
Attorneys for Appellee.

INDEX

	Page
Nature of Appeal -----	1-2
Contract between Warren and Taylor & Co. -----	2
Fixture Company's offer to furnish fix- tures -----	2-3
Kernodle's proposed guaranty -----	3
Form of Guaranty changed by Fixture Company -----	3
Kernodle signs guaranty at request of Fixture Co. -----	3-4
Fixture Company send drawings for ap- proval, make moulds and patterns and proceed to manufacture fixtures -----	4
Correspondence relative to additional security -----	4-6
Taylor & Co.'s order upon Warren -----	6
Fixture Company learns that Warren's contract calls for brass -----	7
Fixture Company warns Taylor & Co. -----	7
Taylor & Co. disregards warning -----	7
Delivery of fixtures -----	7
Bill for fixtures -----	8
Value of fixtures shipped -----	9
Stipulation waiving form and sufficiency of pleadings -----	9
Defenses in court below -----	9-10

	Page
Brief for Taylor & Co. ignores stipulation	10
Reply to first point-----	10
When offer was accepted it was binding contract -----	11
Parties regarded contract as binding-----	11-12
Court directed jury to determine question of existence of contract-----	13
Attempt to create color misleading-----	14
Warren never refused to pay for fixtures on account of delay-----	15
Inferences to be drawn from letter of October 28, 1916 -----	15
Reply to second point-----	16
Testimony of value of fixtures-----	16-18
Novation and court's charge thereon-----	18-19
Appeal of Kernodle-----	19
All questions left to the jury-----	20
Kernodle's guaranty -----	21
Law governing the case-----	22-24
Analysis of appellant's cases-----	25-26
Kernodle guaranty made at the request of Fixture Company -----	26-27

IN THE
Court of Appeals
OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1920

No. ~~2435.~~ 3425

J. E. TAYLOR & COMPANY,
A Corporation, and
GEORGE W. KERNODLE,
Appellants,

vs.

EMPIRE LIGHTING FIXTURE
COMPANY, INC.,
Appellee.

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF FACTS

This appeal is from a judgment entered on the verdict of a jury in the court below for the appellee in a suit growing out of an ordinary commercial transaction between the Empire Lighting Fixture Company, the plaintiff below (for the sake of brevity hereinafter referred to as the Fixture Com-

pany), and J. E. Taylor & Co., one of the defendants below (hereinafter referred to as Taylor & Co.), and George W. Kernodle, another defendant below (hereinafter referred to as Kernodle) (R. 1-17).

Prior to the making of the contract which is the basis of this suit, Taylor & Co. had a contract with Bates Warren to furnish and install electric lighting fixtures in a large apartment house, known as the De Lux, being erected by him at 2029 Connecticut Avenue, N. W., District of Columbia (R. 26). This contract provided that the fixtures were to be made of brass of the same character as fixtures manufactured by the Sterling Bronze Co., of New York, (R. 27). But this fact was unknown to the Fixture Company.

Taylor & Co. ^{evidently} ~~evently~~ not having the fixtures on hand and having to purchase them on the market procured the Fixture Company, of New York, to submit a detailed offer to furnish the fixtures needed in the apartment house (R. p. 21).

The Fixture Company, being unwilling to rely upon the ability of Taylor & Co. to make the payments for such a large order, it was suggested by one of the Taylors during the course of the negotiations that Kernodle, who was Secretary of Taylor & Co., and had a lot of money invested in the company and took charge of its finances, would become guarantor for the price of the fixtures (R. p. 25).

Accordingly on July 12, 1916, the Fixture Company sent Taylor & Co. a schedule of the fixtures asking that it be given prompt attention and that

some satisfactory arrangements be made for payment (R. p. 21). On the next day Taylor & Co. returned the accepted schedule together with a *proposed guarantee* of Kernodle (R. p. 21).

On July 14, 1916, the Fixture Company mailed to Taylor & Co., a corrected schedule of the fixtures to be furnished and asked that it be promptly signed and returned. In the same letter the Fixture Company stated that the guaranty of Kernodle was not in good form, *and requested that Taylor & Co. have Kernodle sign the form of guaranty therewith enclosed and return the same promptly* (R. p. 22).

The corrected schedule of fixtures, dated July 14, 1916, was accepted and signed by Taylor & Co. (R. p. 18). In this schedule the price of the fixtures is stated to be \$4,756 f. o. b. New York. The payments were to be made thirty days from date of shipment (but date for shipment was not specified), and anticipated in case the account exceeded \$1,500 (R. p. 18). To secure the terms of payment set out in said schedule, Kernodle signed and turned over to Taylor & Co. for forwarding the form of guaranty, prepared and requested by the Fixture Company, which instrument recited that in consideration of one dollar the receipt of which was thereby acknowledged and the further consideration of his interest in Taylor & Co.'s contract with the De Lux Apartment House he thereby guaranteed the payment of all merchandise ordered from the Fixture Company according to schedule of that date; and that should Taylor &

Co. fail to make payments according to terms of the schedule, he would make such payments the same as if he had purchased the merchandise for his own account (R. p. 20).

After the foregoing contracts had been entered into, Appellee's witness Ansorge, testified that his Company made a number of working drawings for the different fixtures mentioned in Schedule of July 14, which were mailed to Taylor & Co., for approval. After drawings were approved his Company made moulds and tools and proceeded to manufacture the fixtures (R. p. 20).

During the months of August and September, 1916, several letters were addressed by the Fixture Company to Taylor & Company, urging the latter company to make better arrangements as to payments. The first letter, written August 7, 1919, stated that the job must be pushed; that the information with respect to Kernodle's financial condition was not definite; that the bulk of the fixtures would be required at the same time; urged, in order to meet heavy initial expense for moulds and patterns, a two months note for \$500.00 endorsed by Kernodle and also an acceptance of a change in terms whereby Taylor & Co. would agree to pay sight draft bill of lading for fixtures (R. p. 22). Taylor & Co. replied that they would take the matter up with Kernodle, but suggested that he would be irritated (R. p. 22). To this letter the Fixture Company replied that they could not see that Kernodle should be irritated; that he was well thought of but had no rating and

was not established in business which was the only reason that they could not accept him as guarantor on such a large order in which there was so much special mould work taken at a very close margin of profit (R. p. 22). The changes in financial arrangements urged by the Fixture Company were not acted upon by Taylor & Company and Kernodle (R. p. 25).

Taking up the matter again on August 29, 1916, the Fixture Company wrote Taylor & Co., that progress on its contract for fixtures was somewhat delayed because satisfactory arrangements as to payment had not been made, and suggested that if Bates Warren would accept Taylor & Co.'s order upon him for the full amount of the contract for the fixtures, the Fixture Company would accept the arrangement (R. p. 23). To this proposition Taylor & Co. replied, September 8, 1916, that Bates Warren would accept such an order upon him, but payments would only be made when fixtures were installed in the building (R. p. 23). In the same letter Taylor & Co. stated that the building was ready for fixtures and asked to be advised as to the exact progress of the work upon the fixtures at that time, and stated that "we will want as many of them as you can give us right away," (R. p. 23). To this letter the Fixture Company, September 13, 1916, replied that they would expect payments upon delivery and stated that until they had heard definitely from Taylor & Co. they could make no promises, presumably about immediate shipments (R. p. 23).

Still urging better financial arrangements, the Fixture Company on September 30, 1920, wrote to Taylor & Co. that they were waiting for an acceptance of its proposition of September 13, 1916 (which was an order upon Bates Warren to make payments on account of fixtures upon delivery), and stated further that no work had been done on the order for the last few weeks because of a lack of satisfactory arrangements with Bates Warren and because of a strike in the factory (R. p. 23). Finally in response to these urgings on the part of the Fixture Company for additional security for the fixtures, Taylor & Co., on October 2, 1916, drew upon Bates Warren an ordinary commercial order directing him to pay the Fixture Company the sum of \$5,000 and charge the same to Taylor & Co.'s contract with him. On the next day Warren endorsed upon the order a qualified acceptance agreeing to pay the order when the fixtures were delivered to his building, and also upon condition that the fixtures were in accordance with his contract with Taylor & Co. (R. p. 24).

The order with Warren's endorsement upon it was then delivered to the Fixture Company which caused to be endorsed thereon the following:

“Accepted except as to conditions of contract between J. E. Taylor & Co., and Bates Warren, which are not familiar to us.

“Empire Lighting Fixture Co.,

“Percy I. Ansorge,

“President.” (R. p. 24.)

October 4, 1916.

On the next day, October 5, 1916, Taylor & Co. wired the Fixture Company "Start work per agreement yesterday see letter tomorrow further instructions."

On October 28, 1916, the Fixture Company wrote Taylor & Co. that "After talking to you over the telephone today, I consider it is inadvisable to evade the question whether the fixtures are to be made of Brass or White Metal. * * * Should your contract with Mr. Warren stipulate specifically that brass is to be used through, we are quite sure that you will have difficulty in obtaining payments, and suggest that the matter be threshed out now, and that you take the matter up in Washington at your end, and I will take it up with Mr. Browning here in New York City, this coming week." (R. p. 28.) To this letter Taylor & Co., October 30, 1916, replied, "You can use your own judgment about explaining the advantages of white metal as against brass. It is not the point at this time, however, and we will have no opportunity of going into the matter with him before he leaves. The principal point at this time is delivery." (R. p. 28.)

The first delivery of fixtures were made on November 4, 1916, and on November 7, 1916, Taylor & Co. wrote, "We are pleased to note that shipment of brackets would be made today, and trust that you will continue the good work," and further, "we think that if shipments are made continuously even though you remain from ten days to two weeks back of the time agreed upon, there

will be no more complaint, as long as the shipments keep coming," (R. p. 29).

November 30, 1916, the Fixture Company rendered its bill to Taylor & Co., for shipments made containing items of fixtures to the value of \$1,807.05 (R. p. 8 and p. 20). No payment on account of this bill was made, but instead Taylor & Company wrote the Fixture Company, Dec. 5, 1916, quoting a paragraph from a letter that the former company had received from Bates Warren stating that unless the Fixture Company made certain specific shipments in the next fifteen days that he, Warren, would cancel his contract (with Taylor & Co.) for fixtures and go into the open market and buy such suitable fixtures as he could obtain and charge the cost of the same to Taylor & Co., which would in turn look to the Fixture Company for reimbursement (R. pp. 30, 31). As an excuse for not making payment for fixtures shipped during the month of November, 1916, Taylor & Co., on December 11, 1916, wrote that, "Mr. Warren is expected to be in the city tomorrow and we will try and get a note for \$1,500 and forward the same at once." To further excuse themselves for non payment of fixtures delivered and to hasten the shipment of more fixtures Taylor & Company, on December 13th wrote, "Mr. Warren left the city last night for several days without signing your note, and notified us that unless we could make a better showing than we have by the time he returns, he will start an action for damages," and further, "It will be to your interests to double up

your working force on this order now and clean it up." (R. p. 32.) The Fixture Company continued to ship fixtures until December 16, 1916, at which time they had shipped in all fixtures to the value of \$3,214.25 which amount the jury found by its verdict.

By stipulation of counsel for the respective parties, all questions of the form and sufficiency of the respective pleadings were waived (R. p. 17), and the case was tried and submitted to the jury upon the law and testimony adduced (R. p. 34-40).

The defense of Taylor & Co. in the court below was that there was a conspiracy between that company and the Fixture Company to defraud Bates Warren by substituting white metal for brass in the fixtures furnished (Prayer 2), a substitution of a new contract between Warren and the Fixture Company for the contract of July 14, 1916, which relieved Taylor & Company (Prayers 3, 6, 7, 8 and 9), and a counter claim for damages for breach by the Fixture Company of the contract of July 14, 1914. (Prayer 4, R. p. 34.)

The defense of Kernodle in the court below was that his written guarantee of July 17, 1916, constituted merely an offer to guarantee the performance of the principal contract and that his offer was not accepted (Prayers 1, 2, 4), that if it was accepted changes were made in the principal contract without his consent which released him (Prayer 3), and that his writing of July 17, 1916, was merely an offer to guarantee the principal contract and that there was no testimony showing

that the offer was ever accepted (Prayer 5, R. p. 34). The court denied all the prayers in the language offered, but in its charge to the jury fully covered all the points raised by the prayers offered, except those prayers asking for a directed verdict for the defendants (R. pp. 35-40). This charge to the jury is long and the salient points only will be noticed in argument.

APPEAL OF TAYLOR & COMPANY

Before discussing the first and second points made in counsel's brief for this appellant we desire to bring to the attention of the court the fact that counsel has pitched his whole argument upon the point that the suit is upon one special count upon a contract. So much stress is laid upon this point that counsel has taken the pains to set out the count in full, Brief pp. 1, 2, notwithstanding the fact that the form and sufficiency of the pleadings were by stipulation of counsel in open court, waived (R. p. 17). It was to avoid such questions as this that the stipulation was made, and we submit that counsel should not be permitted to waive in the court below a question that could have been cured, and take advantage of it upon appeal.

REPLY TO FIRST POINT

When Taylor & Company accepted the offer of the Fixture Company of July 14, 1916, there was a binding contract between them, regardless of what

might have been done by the parties afterwards. This proposition is fundamental. Counsel for Taylor & Company says there was no contract. To sustain this contention he endeavors by quoting from a letter of July 12th, to make it appear that the offer of the Fixture Company was made contingent upon satisfactory arrangements as to payments being made. Brief, page 3. This contention overlooks the plain facts of the record. The Fixture Company did send on July 12th, a scheduled offer to furnish the fixtures and make the statement quoted from the record. But this schedule was not accepted and is not the one which is the basis of this suit. This schedule, which was on July 13th returned by Taylor & Co. to the Fixture Company together with a proposed guarantee from Kernodle, disappeared altogether and another schedule offer was sent Taylor & Co. under date of July 14th, which is the schedule that was accepted by Taylor & Co., (R. pp. 18, 22). The quotation from the record on page three of counsel's brief is not in point except that it shows that there were negotiations leading up to the final offer and acceptance of July 14, 1916.

There is not a single line in the correspondence or the testimony of the parties showing that either of them regarded it as anything but a completed transaction and a binding contract between them. On the other hand the evidence is that both parties regarded it as binding upon them. On August 7, 1916, the Fixture Company wrote, "The time has now come when we must push this job forward

with all speed * * * send us your acceptance of a change in terms" (R. p. 22). August 29th, the Fixture Company wrote, "The progress on your contract is somewhat delayed" (R. p. 23). September 8th, Taylor & Co. wrote, "The building, however, is ready for fixtures, and we have already assembled and are ready to deliver fixtures other than those to be furnished by you" (R. p. 23). September 30th, the Fixture Company wrote, "We have not done any work on your order in the last few weeks" (R. p. 23). This is not the language of parties negotiating about a contract. It is the language of parties between whom a contract already exists.

But counsel says, brief, page 3, that various and unsuccessful efforts were made during July, August and September to reach an agreement, but he fails to add what the agreement sought to be arrived at was about. It certainly was not about the kind or number of fixtures to be shipped, or the price to be paid therefor. That was agreed upon July 14th. No, it was about some assurance that the Fixture Company would get its money when the fixtures were shipped in accordance with the terms of the contract of July 14th.

Further counsel says, brief, page 4, that if an agreement was ever reached, it was not until October, 4, and that the *writings* (he does not call it a contract), then took the form of an order drawn by the defendants upon Warren. But is this inconsistent with the existence of the contract of July 14? It is not. It is consistent with the existence

of such a contract. It is a very common form of commercial transaction where one person owes money to a second person and has money owing to him from a third such as were the facts in this case. While the order was on Warren to pay for the fixtures he was to do so for Taylor & Co. and upon the consideration that the amount paid be charged against Taylor & Company.

However, the jury had this entire question before them to decide, for the court charged:

“Did they arrive at a contract with respect to this matter so that the plaintiff was to furnish certain goods and the defendant was to take them and pay for them? That is disputed right on the threshold. It is said there was of course, a negotiation about a contract and a great deal of correspondence when the contract was drawn up and the guarantee was drawn up, and there were conversations between the parties, but that nothing was really done under it and it was all held in abeyance for a long time; that the plaintiff had not even attempted to go to work upon the contract, much less had shipped any of the goods, and that before the matter was really completed, agreed upon and entered upon, a shift was made and a new party came in as purchaser of the goods—Mr. Warren. That matter has been thoroughly discussed to you on both sides. The various pieces of testi-

mony bearing upon it have been called to your attention, and the writings, the course of the proceedings and dates of different transactions, and it is a question of fact for you to determine which party is right about it." (R. pp. 35-36.)

The jury decided there was a contract and that no new party had been substituted, and we submit that defeated parties are not in a position to have their cases retried on the facts in this court.

There is just one other thing under this heading which, on account of the duty we owe our clients, we feel that we should call to the attention of the court. On page six of brief for Taylor and Company counsel states:

"and of delays in delivery resulting in such injury to Mr. Warren that he refused to pay for them for these reasons although he had been 'exceptionally patient' and had given timely warning and notice of injuries sustained and to be sustained by him (R. pp. 29, 30)."

While we recognize this as an attempt to create color and background it is obviously misleading and not a fair deduction from the record. In the first place Mr. Warren was never exceptionally patient with the Fixture Company, although Taylor & Company, in an effort to get more fixtures without paying for those already delivered, wrote

that he had been patient with them (R. p. 31). In the second place the statement is misleading for the reason that there is not a scintilla of evidence by Warren or anybody else that Warren refused to pay for the fixtures because of "delays in delivery." What Warren did after failing to sign a promissory note for the fixtures already delivered was to write a threatening letter to Taylor & Co. that unless more fixtures were delivered in a certain time, he would buy other fixtures and charge the cost of the same to Taylor & Co. Now if he had a contract with the Fixture Company as our opponent says he had, why didn't he notify the Fixture Company that he would charge the cost of the fixtures to them?

If any inferences are to be drawn upon the subject we direct the attention of the court to the letter of October 28, 1916, written by the Fixture Company to Taylor & Company which shows that the witness Ansorge had just learned in a telephone conversation that Taylor & Co.'s contract with Warren called for fixtures of brass instead of white metal; and that Ansorge told Taylor & Co. that the question should not be evaded; that if Taylor & Co.'s contract with Warren stipulated specifically that brass was to be used through they would have trouble in getting payments (R. p. 28). In reply to this serious warning Taylor & Co. replied the question of the metal to be used in the fixtures was not the point at that time (R. p. 28). Furthermore Norman I. Taylor testified under cross examination that the letter of October 28, 1916, from

the Fixture Company made no particular impression upon him (R. p. 27).

SECOND POINT

This point in counsel's brief assumes that any number less than all of the fixtures must be worth less than the proportionate price of all, and because defendant did not receive all the fixtures the price agreed upon can not be taken as the measure of value of the fixtures shipped. This proposition is not sound. It is true that a part might have been worth less than the proportionate value of all, but on the other hand they might have been worth more. But how can this question be determined?

Our opponent says that there was no unit price agreed upon and refers to exhibit "A" which is the contract of July 14th. We say there must have been a unit price agreed upon or how could the contract have specified that payments were to be made 30 days from date of shipment, and anticipated when the account ran beyond \$1,500? The witness for the Fixture Company testified, without objection, as to the value of the fixtures delivered. These values were in accordance with estimates furnished Taylor & Co. prior to the execution of the contract of July 14, 1916, (R. pp. 20, 21). He also testified, under objection, as to the value of the fixtures not delivered. Was plaintiff's testimony of the value of the fixtures in accordance with the estimates furnished unfair to Taylor & Co.? If it was, why did they not challenge the testimony

when they were before the jury instead of doing so here? In the absence of their doing so, the presumption is that there was nothing to challenge and that the testimony of the value of the fixtures delivered correctly represented the benefit conferred upon the defendant.

Eastern, E. M. Co. vs. Webb, G. C. Co., 195 Mass. 356, 62.

Vickery vs. Richtie, 202 Mass. 247.

There is not a line of testimony on behalf of the defendant that the fixtures were not delivered or that the value of the same were less than the estimates furnished. Since the price agreed upon is evidence of Taylor & Co.'s admission that the agreed price represents the actual value to them it may (in the absence of evidence that conditions have changed) be taken as representing the value of the fixtures furnished.

Beha v. Ottenberg, 6 Mackey 348, 351.

But counsel again adverts to the allegation that there are no common counts under which this testimony could have been considered. The answer to this is that by stipulation of counsel all questions of form and sufficiency of pleadings were waived (R. p. 17). In this situation, where plaintiff had offered testimony of value which had not been denied, what was the court to do but charge the jury that the defendant had received these fixtures and must pay for them?

NOVATION

Under this head counsel, brief, page 9, states,

“The only hypothesis left to the jury justifying a finding for the defendant was, first a contract with it, next a new contract with Warren and, last, a release of defendant under its contract; in other words, a novation, only. Even when counsel undertook to clear it up, he was interrupted.”

and then follows a quotation of only part of the record on this phase of the case. Counsel is hardly frank with this Court. By referring to the record it will be seen that, following the Court's charge, this occurred:

“Mr. White: If your Honor please, there are just two things in your Honor's charge in relation to the novation which of course presumes a contract with the defendant corporation, first, and a substitution of another contract. It seems to me there is left out of consideration that the contract never was complete until May, after the introduction of Mr. Warren. If your Honor will add to the charge in that regard—

“The Court: I accept what Mr. White has just said in your hearing. That is certainly true. The defendant means that the contract never was completed, so that there

was no occasion for substituting anyone else for the defendant company. That is a matter for you to consider. (R. p. 40.)”

To this correction Mr. White made no objection.

The suggestion of whether or not there was a substitution of Warren for Taylor & Co. was fully and fairly submitted to the jury by the court, and its conclusion is shown by the verdict.

This defendant suffered no prejudice in the trial of the case below, and we respectfully submit that the judgment against it should be affirmed.

APPEAL OF KERNODLE

The two points raised by this appeal are grounded on the refusal of the court below to grant an instruction directing the jury to return a verdict for this appellant. The alleged grounds for such an instruction are that the undisputed testimony showed, (1) that the paper signed by Kernodle amounted in law to merely an offer to guarantee the principal contract and that no notice of acceptance was given, and, (2) that if there ever existed a binding contract of guaranty such changes were made in the principal contract as to release Kernodle. Refusing to grant an instruction directing a verdict, the court ruled and charged that the instrument was an absolute guaranty on its face. and if delivered unconditionally to the Fixture Company and by them relied upon in furnishing the goods, it was binding on Ker-

nodle. The question of whether or not there was an unconditional delivery, relied upon by the plaintiff, was left to the jury to decide. He also submitted to them the question as to whether or not changes had been made in the principal contract (R. p. 39). The testimony relating to the giving of the instrument of guaranty is this: Before the principal contract was entered into but in view thereof, J. E. Taylor, agent of Taylor & Co., suggested to Ansorge, agent of the Fixture Company, in the presence of Kernodle that the latter had a lot of money invested in the Taylor Company, was supervising all its expenditures, was the financial man of the company, took charge of all its expenditures, and would guarantee the payments of Taylor & Company for the fixtures to be sold to it. Ansorge replied to Taylor that he could let Kernodle give references and if they were satisfactory it would be all right with the Fixture Company; otherwise they would want some *additional* guaranty (R. p. 25). The Fixture Company then sent Taylor & Company its schedule offer to furnish the fixtures for acceptance and asked for some satisfactory arrangement as to payments. Taylor & Company apparently made some corrections on the schedule offer and sent it back with the following written instrument signed by Kernodle:

“I hereby guarantee the payments of all bills for goods sold to J. E. Taylor & Co., relative to the De Lux Apartment House contract, for fixtures delivered and ap-

proved, according to terms agreed upon.”
(R. p. 21.)

A day or two later, the fixture company sent a corrected schedule offer to furnish fixtures and asked that it be accepted and stated that “The guarantee is not in good form, and we would request that you have Dr. G. W. Kernodle sign the enclosed form, and return to us promptly.” Taylor & Company signed their acceptance on the schedule offer and Kernodle signed the form of guaranty as requested. Both these instruments in their completed form were then sent by mail to the Fixture Company (R. p. 22). The instrument thus signed by Kernodle and mailed to the Fixture Company is in the following language:

“Washington, D. C.,
“Empire Lighting Fixture Co.,
“224 Center St.,
“New York City.

“Gentlemen:

“In consideration of one dollar (\$1.00), to me in hand paid, and further consideration of my interest in the J. E. Taylor & Co.’s contract with the De Lux Apartment House, I hereby guarantee the payment of all goods and merchandise ordered from you, by J. E. Taylor & Co., for the De Lux Apartment House, according to schedules submitted under this date, for the sum of \$4,756.00.

“Should J. E. Taylor & Co. fail to make payments according to terms on schedule, I will make such payments, for the account of J. E. Taylor & Co., to the Empire Lighting Fixture Co., the same as if I had purchased the merchandise for my own account.

“Yours truly,

“G. W. Kernodle.

“Witnessed this 17th day of July, 1916.

“Jas. E. Taylor.” (R. pp. 7, 20.)

With the foregoing facts in evidence we submit there was no error in the court's charge. That the charge was correct is fully sustained by the leading case of *Davis v. Wells Fargo & Co.*, 104 U. S. 159. In this case, although not made at the request of the guarantee as that of Kernodle, the guaranty is almost identical with the one in the case at bar, and the court held that it was an unconditional guaranty when delivered and required no further notice of acceptance. The defense there was that the paper constituted a mere offer to guarantee the principal transaction. The court did not agree with that contention and stated:

“But we are unable to agree to that supposition. We think that the instrument sued upon is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells Fargo & Co., and that it was understood and

intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words—‘for and in consideration of one dollar to us paid by Wells Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee, etc.’ How can that recital be true, unless the covenant of guarantee had been made with the assent of Wells Fargo & Co., communicated to the guarantors? Wells Fargo & Co., had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

“It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of *Lawrence v. McCalmont*, 2 How., 452, and was overruled.” (p. 170.)

* * * * *

“It does not affect the conclusion, based on these views, that the guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected.” (p. 170.)

It would seem, therefore, that the controlling facts underlying this decision were that the

guarantors acknowledged the receipt of a consideration other than the consideration of the principal transaction, as moving from the guarantee to the guarantors; and that the obligation which the instrument was to guarantee was already in existence between the principal parties.

Kernodle's guaranty acknowledged the receipt of an independent consideration moving to him from the Fixture Company, was intended to guarantee an obligation already in existence, and furthermore was *made at the request of the Fixture Company* (R. p. 22). Does the law of contracts require anything more for the creation of an obligation? We submit it does not. Nor do the cases cited and relied upon in this appellant's brief require more. The following is from the principal case relied upon by him:

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is *signed by the guarantor at the request of the other party*, or if the latter's agreement to accept is contemporaneous with the guaranty, *or the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty*, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." (Italics ours.)

Davis Sewing Machine Co. vs. Richards, 115 U. S. 524, 525.

A search of the cases relied upon by this appellant will disclose that the facts underlying the decisions were not similar to the facts in the case of Davis v. Wells Fargo & Co. nor to the facts in the case at bar.

APPELLANT'S CASES

In Henderson v. Reilly, the instrument sued upon was not made at the request of the beneficiary, recited no independent consideration moving from the beneficiary to the guarantor, and the principal obligation which the instrument was to guarantee was not in existence but was prospective only. Neither the instrument nor the facts surrounding its delivery showed any assent on the part of the beneficiaries.

The guaranty sought to be enforced in the case of Davis Sewing Machine Co. v. Richards was made at the request of Poler, who was seeking the credit, it recited no consideration independent of the prospective credit, and was sent to the party to be guaranteed along with the principal contract which had not been accepted by the Sewing Machine Company. Upon receipt of the principal contract upon which the guaranty was written the Sewing Machine Company executed (accepted) the principal contract, extended credit under it, but failed to notify the guarantors of the acceptance to the guaranty.

In Barnes Cycle Co. v. Reed, the receipt of an independent consideration is acknowledged, but it did not appear from the paper or the testimony by whom the consideration was paid, nor whether the same was requested by the beneficiary. Nor was there any principal contract or obligation in existence which the writing purported to guarantee. The principal transaction was prospective, and for these reasons the court held the guaranty was provisional only.

The letter addressed to Mayaud Brothers in the case of Hoffman v. Mayaud, recited no independent consideration and looked to the future extension of credit which might or might not be given. The credit was afterwards extended but no notice was given of the acceptance of the guaranty.

For the reason that the facts in the foregoing cases are dissimilar to the case at bar we submit that they are not in point and do not sustain this appellant's contention. On the other hand we submit that the facts in the case at bar are on all fours with the case of Davis v. Wells Fargo & Co., and that the ruling in that case is the correct rule to be applied in the case at bar.

A considerable effort is made in the brief for this appellant to show that the guaranty sued upon was delivered upon condition that it would be accepted if, after investigation, Kernodle's financial standing was found satisfactory. There was some testimony to this effect but it was disputed. The testimony on behalf of the Fixture Company was: "you can also let Dr. Kernodle give you references

and if the references are satisfactory it will be all right with us. Otherwise we may want some additional guarantee." (R. p. 25.) Our opponents contend, however, that this is denied by the letters written to Taylor & Co. by the Fixture Company and by the testimony of the witness Taylor. Contrary to this the letters written between these parties merely show that the Fixture Company was justly anxious about receiving its money for the fixtures it had sold to Taylor & Co., and was strongly urging the latter company to make better arrangements in respect of payments which it could certainly do without giving up the security afforded by the guaranty of Kernodle. It was a most natural thing for the Fixture Company, fearing that the security afforded by Kernodle's guaranty was not quite sufficient, and desiring additional security, to minimize, in writing to Taylor & Co., the value of Kernodle as a guarantor. Kernodle was already bound, and what reason would the Fixture Company have in calling Taylor & Co.'s attention to this security they already had when asking for additional security. If the Fixture Company never accepted nor did not intend to rely upon Kernodle's guaranty as far as it would go, why did they not return it?

This disputed question, as well as the question of changes alleged to have been made in the original contract, was however submitted as a question of fact to be determined by the jury. The jury determined it, and we submit that the weight of the testimony cannot be reviewed upon appeal.

For the foregoing reasons the judgment appealed from should be affirmed.

Respectfully submitted,

BYNUM E. HINTON,
J. H. BILBREY,
Attorneys for Appellee.

